

COURT OF APPEAL
PORT-HARCOURT DIVISION
11TH FEBRUARY, 2009. CA/PH/EPT/197/08
CORAM:- S. A. IBIYEYE, C. B. OGUNBIYI, P. A. GALINJE,
O. ARIWOOLA, G. O. SHOREMI, JJCA

1. CHIEF THEODORE AHAMEFULE ORJI
2. CHRIS ALOZIE AKOMAS APPELLANTS
AND
1. ONYEMA UGOCHUKWU
2. HON. CHIWENDU NWANGANGA RESPONDENTS
3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION
(INEC) & 2,894 OTHERS

APPEALS - Appellant's brief - Failure to file - Effect - Where appellant fails to file his brief - The grounds of appeal are deemed abandoned (H1)

APPEALS - Election petitions - Interlocutory appeals - Applicability - Election petition matters are sui generis - In that the only right of appeal cognisable is from the final decision of the tribunal - This rules out interlocutory appeals (H2)

JUDGMENTS - Decision of courts - Nature of - Whether final or interlocutory - A trial court's decision on wrongful admission of evidence - Is part of the main trial - Not an interlocutory decision (H3)

APPEALS - Grounds - Particulars - Manners of stipulating - There are variant ways of portraying particulars of error - Whether it is styled "When" instead of particulars of error - It serves the same purpose (H4)

ELECTION PETITIONS - Validity of - Where result has not been announced - Announcement of election result is a condition precedent - To validity of an election petition (H5)

PRACTICE & PROCEDURE - Election petitions - Breach of procedure - Effect - Election tribunal is of such a special nature - That a

slight default in procedure - Could result in fatal consequences for the petition (H6)

EVIDENCE - Hearsay - Effect - Hearsay evidence has no probative value - It should be regarded as inadmissible evidence - And should be expunged if admitted in error (H7)

CONSTITUTIONAL LAW - Public service - Scope - By the provision of section 318 of 1999 Constitution - Political appointees are not public servants for purpose of section 182 (9) of 1999 Constitution (H8)

EVIDENCE - Election petitions - Witnesses - Admissibility - As PW5 was listed during front loading - As required by the rules - Petitioner will not be allowed to bring him at the reply stage - When respondent could no longer reply to their assertions (H9)

EVIDENCE - Proof - Secret society - Oath taking - Effect - Though oath taking is one of the aspects of the constitutional definition of secret society - There are several other constituents - That must coexist with it to make for a secret society (H10)

TRIBUNALS - Election petitions - Jurisdiction - It is limited to determination of whether a person is validly elected - It does not extend to investigation of pre-election matters (H11)

PRACTICE & PROCEDURE - Consolidation of suits - Effect - It is only done for convenience and does not fuse the consolidated cases - So evidence given in respect of one - Does not ipso facto become evidence given in the other (H12)

TRIBUNALS - Election petitions - Findings of fact - Consequential reliefs - After holding that appellants scored majority of vote cast - It was perverse for the tribunal to return 1st respondent as a winner in the election (13)

JUDGMENTS - Propriety of - Judgment given in favour of defendant - Who led no evidence - Is proper where plaintiff failed to call

evidence on all materials facts - Or where plaintiff's evidence is destroyed via cross examination (H14)

FACTS

The 1st and 2nd petitioners/respondents each filed a petition challenging the result of the gubernatorial election held on 14th April, 2007, in Abia State which returned 1st and 2nd appellants as governor and deputy governor respectively. It was the case of the petitioners that the 1st and 2nd appellants were as at the date of the election each not qualified to contest as candidate for their respective offices. Further, that the result of the election was yet to be announced by the appropriate returning officer for the election as, according to petitioners, the person that purported to have announced the result was not the appropriate authority. With regards to the disqualification of the said appellants, petitioners alleged inter alia, that 1st appellant was a member of a secret society and was accordingly disqualified under the Constitution. As the respective petitions filed by the 1st and 2nd respondents were similar in content both were consolidated on order of the tribunal. However, following the consolidation an application was made by the petitioners for a single line of witnesses to be led in respect of the two petitions which application was granted.

After hearing, the tribunal found for the petitioners as it held inter alia, that 1st appellant was a member of a secret society and as such was disqualified. Aggrieved, appellants have brought this appeal against the judgment of the tribunal. It is their contention that the petitions were invalid and that the tribunal was wrong to have assumed jurisdiction to hear the same, in that the petitions stated on their faces that the result of the election had not been announced, which would mean that the petitions were premature.

ISSUES FOR DETERMINATION

“(i) Having regard to the clear pleadings backed by the reliefs of the petitioners/1st and 2nd respondents to the effect that the result of the election had not been announced/declared as at the time the petition was filed, whether or not the condition precedent for the filing/presentation of an election petition had arisen or crystallised to warrant the presentation of the petition by the petitioners and for the lower tribunal to assume jurisdiction on same.

(ii) *Whether or not within the context and interpretation of section 182(1)(9) of the Constitution of the Federal Republic of Nigeria, 1999, read together with section 318(1) of the same Constitution, 1st and 2nd appellants were, at the time of election, employees in the public service of a State (Abia State) to warrant their resigning from their employment at least 30 days to the date of the election.*

(iii) *Even if the answer to issue (ii) supra is in the affirmative, whether or not having regard to the pleadings and evidence placed before the lower tribunal, the lower tribunal was not in grave error to have held and concluded that the appellants breached and/or were disqualified from contesting the election by section 182(1)(g) of the Constitution.*

(iv) *Considering the pleadings of the petitioners/1st and 2nd respondents vis-a-vis the inadmissible evidence tendered by them, whether or not it was established before the lower tribunal that Okija shrine is a secret society within the ambit, context and definition of section 182(1)(h) read together with section 318(1) of the 1999 Constitution.*

(v) *Having regard to the state of the pleadings of the appellants vis-a-vis the mandatory provision of paragraph 1(1)(c) of the Election Tribunal and Court Practice Directions, 2007 (Practice Directions) and the inadmissible evidence proffered by the petitioners/1st and 2nd respondents, whether sufficient materials were placed before the lower tribunal for it come to the conclusion that the 1st appellant was a member of Okija secret society.*

(vi) *Having regard to the specific jurisdiction of the lower tribunal as prescribed and circumvented by section 285(2) of the Constitution coupled with the fact that the twin issues of non-resignation of appellant from the public service of Abia State and the purported membership of the 1st appellant of Okija secret society are pre-election matters, whether or not the lower tribunal had jurisdiction to entertain the said issues and nullify appellants' election on same. (Etc. see p. 2522)*

HELD (Unanimously allowing the appeal per **IBIYEE JCA**)
Appellant's brief - Failure to file

1. It is now very well settled that appeals are heard by the appellate court or briefs of argument wherein issues are raised from the grounds

of appeal identified by the appellants or their learned counsel. The purpose of formulating issues in a brief of argument is to isolate from the grounds of appeal filed the critical issues relevant for the determination of the appeal. It is fatal for an appellant in particular to raise grounds of appeal without identifying issues for the determination of the appeal. The consequence is that such grounds of appeal are deemed abandoned. It is also instructive to state the settled law that arguments in briefs of argument should be based on issues raised from the grounds filed and not on the grounds themselves. That is part of the essence of brief writing. It stands to reason in the prevailing circumstances of this appeal that the appellants in petition No. ABS/ GOV/EPT/9/2007 did not intend to rely on any brief of argument if they could file a brief of argument in the appeal against the judgment in petition No. ABS/GOV/EPT/4/2007 without one for petition No. ABS/GOV/EPT/9/2007. I agree with the learned counsel for the respondents in the instant appeal that the grounds of appeal thereat have been abandoned and the grounds are accordingly struck out. (p. 2520 E)

Election petitions - Interlocutory appeals - Applicability

2. The learned senior counsel for the 1st and 2nd appellants submitted that despite the objection of the 1st and 2nd respondents they have conceded at paragraph 3.2 at page 13 of their joint brief of argument on the objection to ground 1 that:

“There is no doubt that the issue of jurisdiction can be raised at any time of proceedings and even for the first time at the apex court.”

He referred to the cases of Ikweki v. Ebele (2005) 2 SC (Pt. 11) 96 at 110; (2005) 11 NWLR (Pt. 936) 397 and S.P.D.C. (Nig.) Ltd. v. X.M. Fed. Ltd. (2006) 7 SC (Pt. 11) 27; (2006) 16 NWLR (Pt. 1004) 189 relied upon by the respondents and submitted that these cases are ordinary civil cases that have little bearing to election petition matters which are *sui generis* in nature with its procedural rules and law as set out in the Electoral Act, 2006 and the Election Tribunal and Court Practice Directions, 2007 made pursuant to the Constitution of the Federal Republic of Nigeria, 1999. He cited in particular, section 246(1)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as the 1999 Constitution) which stipulates the only right of appeal cognisable from the decision of an

election tribunal to this court. *This* stipulation therefore rules out any other types of decision such as interlocutory decision.

I have incisively considered the submissions and arguments proffered by the learned senior counsel for the appellants and the 1st and 2nd respondents and I am of strong opinion that those of the former are more pungent than those of the latter. (pp. 2527 B/E & 2528 B)

Decision of courts - Nature of - Whether final or interlocutory

3. It is also pertinent to state that a decision made by a trial court on wrongful admission of evidence or wrongful rejection of evidence is part of the substantive or main trial and not an interlocutory decision. A party wishing to appeal against the judgment of the trial court can file one of the grounds of appeal alleging that inadmissible evidence had been admitted during trial or admissible evidence had been rejected. (p. 2530 H)

APPEALS - Grounds - Particulars - Manners of stipulating

4. I have painstakingly perused the seemingly vexed ten grounds of appeal alleged by the 1st and 2nd respondents to be incompetent for want of particulars from which the misdirections in law emanated. I found that each of those grounds provided relevant particulars which are headed in common legal parlance as “*particulars of errors*” as in grounds 4, 7, 11 and 21. Whereas in grounds 1,2,5,6, 13 and 19, the uncommon heading like “WHEN” was used .

I do not think the variant way of portraying particulars of error required by Order 6 rule 2(1)(2) and (3) of the Court of Appeal Rules, 2007 has done any violence to the intendment of the provisions of the Court of Appeal Rules cited (ante). I hold the view that the heading styled “ *When* “instead of particulars of errors” in drafting particulars under grounds of appeal is a slant which serves the same purpose as the phrase “particulars of errors. (p. 2532 D)

ELECTION PETITIONS - Where result has not been announced

5. The combined reading and application of the foregoing two provisions which operate cumulatively portrays what a valid petition should contain and they serve as conditions precedent. Those procedural steps are in effect a sine qua non for a valid petition. It is now

very well settled that an election petition is heard and determined by an appropriate election tribunal. It is also pertinent to state that if in a petition the petitioner states that the result of the election has not been announced that such a petition does not contain a cause of action.

It is apparent from the state of proceedings in the petition before the trial tribunal that the 1st and 2nd petitioners/1st and 2nd respondents in their reliefs (iii), (iv) and (v) and paragraph 6 (a), (b) and (c) (already reproduced) where the petitioners did not mince words in alleging that the result of the attendant election of 14th April, 2007 had not been announced by the Resident Electoral Commissioner. In view of this clear assertion, albeit self defeatist, the 1st and 2nd petitioners/1st and 2nd respondent, by virtue of the several principles on competence of a petition, it will be foolhardy for this court being an appellate court, to hold that the petition in issue conferred jurisdiction on the trial tribunal. (pp. 2541 E/H & 2542 G)

Election petitions - Breach of procedure - Effect

6. The jurisdiction of an election tribunal is of a special nature such that a slight default in complying with the procedural steps which otherwise could be cured or waived in other proceedings could result in fatal consequences for the petition.

It is at the risk of repetition to state the trite law that it is the petitioner's petition and/or the plaintiff's action that vests jurisdiction in a court and if the petitioner's claim has divested the trial or lower tribunal of jurisdiction, the entire proceedings before the lower tribunal constitute a nullity and as an election matter being *sui generis*, the proper order to make is not just striking it out but that of dismissal. (pp. 2541 G & 2542 E)

EVIDENCE - Hearsay - Effect

7. First, the 1st and 2nd respondents made such serious allegations as collecting salaries, living in and using government of Abia State facilities within 30 days before the election which took place on 14th April, 2007 without adducing pungent evidence to back up such allegations. All that happened were bare assertions by the star witness, the PW1. The question is how reliable is the evidence of the PW1. I am of the view that from the state of the record of appeal that his

testimony which the trial Tribunal found to be replete with hearsay cannot attract any probative value. In effect his testimony consisting oral and documentary evidence which emanated from parties not called to substantiate the items passed on to him (the PW1 are to say the least are not cognizable as legal evidence from which any truth would emerge. I agree with the trial tribunal that the evidence of the PW 1 on which the judgment of the trial tribunal was based is hearsay. The trite position in law is that hearsay evidence has no probative value. The consequence thereby is to discountenance it and where it has been made used of by the court, it should be regarded as inadmissible evidence and expunged. It is accordingly expunged. (p. 2547 E)

CONSTITUTIONAL LAW - Public service

8. The 1999 Constitution has apparently gone a further step by making itself explicit in the interpretation or explanation of what it meant by public service of the federation of a state in its S. 318(1) in its categorization of the term under sub paragraphs (a), (b), (c), (d), (e) and (f) already reproduced above and that under none of these categorization does a chief of staff to a Governor or Commissioner for a State fall. It should be observed that the petitioners did not specify the particular offices held by the 1st and 2nd respondents in their petitions. This was, however, unveiled when the 1st and 2nd respondents averred in their reply and address that they were Chief of Staff to the erstwhile Governor of Abia State and a past Commissioner in that Government. This disclosure is acceptable and the tribunal could make use of it instead of holding on to the rigid technicality that the disclosure was not pleaded.

I am bound by the foregoing principles and on the total evaluation of the facts available on record, I shall differ from the finding of the trial tribunal and hold that both the 1st and 2nd respondents/1st and 2nd appellants were not specifically mentioned or within the contemplation of section 318(1) above and not being employees in the public service of Abia State are not bound by Abia State public service rules. In effect, the 1st and 2nd appellants are not in duty bound to give 30 days notice or one month's notice as wrongly averred by the petitioners in paragraph 6 (p) of the petition or any notice at all. (pp. 2549 F & 2550 E)

Election petitions - Witnesses - Admissibility

9. In the instant case, the petition in point No. ABS/GOV/EPT/9/ 07 was filed by the Peoples Democratic Party on 14th May, 2007 but which was not frontloaded with the inclusion of witness, PW5 (Mr. Isaac Olisabueze Okolie) and the document that is to say the video clip marked exhibit HS. Both the PW5 and exhibit HS were not listed or frontloaded as a witness and the document respectively. They were instead brought in particularly in petition No. ABS/ GOV/EPT/9/07 in the reply of the petitioner/respondent's to the reply of the 1st and 2nd respondents/1st and 2nd appellants. This approach to start with is utterly irregular and is an affront to paragraph 1(l)(a)(b) and (c) above as the petitioner cannot at reply stage be allowed to bring in, without leave for an amendment sought and got from the court, any substantial facts which ought to have been raised in the petition itself. It is unfair and prejudicial for the petitioner/respondent to bring in the PW5 and through him (the PW5) exhibit HS into petition No. ABS/GOV/EPT/9/07 at the petitioner's reply stage being a time when the respondents/appellants could no longer reply to their substantial allegations and far-reaching evidence. (p. 2554 F)

EVIDENCE - Proof - Secret society - Oath taking - Effect

10. It is not in doubt that oath taking is one of the aspects that make for the definition of secret society as set out in S. 318 (I) of the 1999 Constitution. But there are several more constituents in the definition of secret society. Without those several constituents operating conjunctively the definition of secret society is not met. I cannot therefore hold that a society, association, group or body of persons without more is a secret society. I instead hold, in the prevailing circumstances of this case, that Okija shrine which the PW1 (1st petitioner/ 1st respondent) alleged the 1st appellant is a member is popularly recognized as such in most parts of the South Eastern Zone of Nigeria not as a secret society but an arbitration shrine. The 1st appellant and by extension the 2nd appellant, in these circumstances, were not disqualified from the general election that took place on the 14th April, 2007 particularly in Abia State because the alleged stigmatisation of the 1st appellant being a member of a secret society called Okija shrine was not established as being functional as such. (p. 2557 G)

TRIBUNALS - Election petitions - Jurisdiction

11. The purport of the foregoing provisions of S. 285(2) above, is clear that the jurisdiction of the trial tribunal is not at large but specific and limited to the hearing and determination of petitions relating to whether any person has been validly elected to the position of a Governor. It is not an inquisitorial tribunal and neither does it have power to investigate what transpired before the election. Indeed, the two issues of non-resignation from the positions of Chief of Staff and Commissioner held by the 1st and 2nd appellants and the purported membership of the 1st appellant of a secret society are, in my view, pre-election matters.

The foregoing provisions which are jurisdictional in nature specifically vest in a State or Federal High Court to disqualify any candidate who is otherwise disqualified by virtue of the reasons given in the petition without recourse to the election tribunal which is specifically set up and vested with original jurisdiction to hear and determine petitions as to whether any petitioner has been validly elected to the office of Governor or Deputy Governor or as a member of any Legislative House. (p. 2559 D/H)

Consolidation of suits - Effect

12. It is also trite that consolidation is only for convenience of trial and does not fuse the consolidated cases. The causes still maintain their individual identity and character and the evidence given in respect of one does not ipso facto become evidence in the other or others. It is consolidation of actions as it will be absurd to have consolidation of judgments. It is also pertinent to state that in consolidated proceedings, there is no single cause of action to which all the persons concerned are parties. Each of the separate suits consolidated has its own parties. The decision in each case is governed by the available relevant evidence adduced in support of actions consolidated. It will not make for strict adherence to the principles of consolidation if, in the course of writing a judgment, the reliefs sought by the two parties or more scamper for the part of the judgment favourable to him particularly in a very voluminous judgment as in the instant case. See *Dugbo v. Kporoaro* (1958) NMLR 7, reported as *Kporoaro v. Dugbo* (1958) SCNLR 180; *Afoezioha v. Nwokoro*

(1999) 8 NWLR (Pt. 615) 393.) The legal authorities on consolidation of actions which are legion also regard the principle that judgments therein shall be separately read on the same day. (p. 2561 G)

Election petitions - Findings of fact - Consequential reliefs

13. I am, however, astounded by the stance of the trial tribunal which turned a blind eye to its earlier decision that the appellants scored majority of yes votes cast at the election as well as having not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the Local Government Areas in Abia State and went on to return the 1st respondent as the winner of the election to the office of Governor of Abia State on 14th April, 2007. This chameleonic attitude of the trial tribunal which could have been its own way of awarding consequential relief is to say the least does not project a practical knowledge of what a consequential relief entails. The subsequent reversal of the finding of the trial tribunal returning the 1st respondent as the Governor of Abia State, a position he did not ask for is not only baselessly gratuitous, highly erroneous but also perverse. I shall interfere with the eventual findings of the trial tribunal and hold that the 1st and 2nd appellants are returned as the Governor and also Deputy Governor of Abia State. I find merit in grounds 18 and 20 of the grounds of appeal. Consequently, I resolve issue No. 8 in favour of the 1st and 2nd appellants. (p. 2563 C)

JUDGMENTS - Propriety of

14. It is also instructive to note the trite position in law that a defendant who did not lead evidence during trial may still be entitled to the judgment of the court where the plaintiff failed to call evidence on the material facts of the case or where the plaintiff is so patently or palpably described unreasonable that no reasonable tribunal can accept and act on it. A defendant can also obtain judgment in his favour without tendering oral evidence, if through cross-examination of the plaintiff and his witness and tendering of documents through them, he destroys and discredits the plaintiff's case and establishes an iron cast defence. He urged the court to resolve issue No. 10 in favour of the 1st and 2nd appellants.

I must say this much that the learned senior counsel for the appellants has exhibited considerable industry in the treatment of

issue No. 10. Any attempt by me to dissect the attendant submissions might be a wasteful venture (*exercise*). In effect, I dare say that those submissions are so impeccable that I agree with him. I find merit in ground No. 24 of the grounds of appeal and allow it. Issue No. 10 adumbrated from the said ground is accordingly resolved in favour of the 1st and 2nd appellants.

In the final analysis, I resolve all the ten issues raised from the twenty grounds of the grounds of appeal in favour of the 1st and 2nd appellant.

The appeal is meritorious and it is allowed.
(pp. 2567 D & 2568 A)

NOTABLE POINTS OF INTEREST **IBIYEE JCA**

1. No distinction between interlocutory and final decision

The law on interlocutory rulings in respect of election matters is non-existent. The law instead recognizes one decision and that is the final decision, which admits of appeal. See section 246(1) of the 1999 constitution. Interlocutory rulings can be safely raised in appeal against the final decision. There is no distinction between interlocutory and/or final decision in election matters. Decision under section 164 of the electoral act, 2006 is interpreted thus:-

“Decision, means in relation to court or tribunal, any determination of that court or tribunal and includes a judgment, decree, conviction, sentence, order or recommendation.” (p. 2530 E)

2. The purpose of consolidation is to save costs

The purpose and principle governing consolidation of actions and/or petitions have been lucidly set out in the case of Haruna v. Modibbo (2004) 16 NWLR (Pt. 900) 489 at 559 to 560 thus:

“The main purpose of consolidation is to save costs and time. It is to save multiplicity of action with attendant costs where one action would serve to determine the rights of a number of persons, where the persons have the same interests in one cause or matter. Any order of consolidation may be made either by consent of the parties or as a matter of expediency. It will not usually be ordered unless there is a common question of fact and law being of sufficient importance, in proportion to the rest of the subject matter.”

(p. 2561 D)

REPRESENTATION

Chief Wole Olanipekun, SAN (with him, Chief Gboyega Awomolo, SAN; Chief U.N. Udechukwu, SAN, Awa U. Awa, Esq., SAN; Ricky Tarfa, Esq., SAN; Chief Adeniyi Akintola, SAN; Chief Solo Akuma, SAN; Professor J. O. Anifalaje; Chief Ifeanyi Iboko; O. Nwamuo, Esq.; C. Nwaogu, Esq.; V.O. Awomolo [Mrs]; L. C. Nwauba, Esq.; Mrs. H. A. Ngranjiwa, Esq.; A. I. Owonikoko, Esq.; Gabriel Uduaji, Esq.; N. Okonkwo, Esq.; Yemisi Dada [Miss]; A. Fajemiroya, Esq. and Emma Off long, Esq.) - for the 1st and 2nd Appellants

E.C. Ukala, SAN (with him, D.C. Denigwe, Esq., SAN; Chief O. S. Obande; Ude Ugochukwu, Esq.; N.M. Nwosu, Esq. and Dike Udenwa, Esq.) - for the 1st and 2nd Respondents

Prince L. O. Fagbemi, SAN (with him, A. Falodun, Esq., SAN; Chief G. I. Chionye, Esq.; K. Fagbemi, Esq.; A. Akanbi, Esq.; A.C. Okoroafor, Esq.; K. Aiyemoyin, Esq.; M. O. Adewale, Esq.; U. Onwuchekwa, Esq. and J. Ejimofor, Esq.) - for the 3rd Respondent
Livy Uzoukwu, Esq., SAN (*with him*, U.S. Awa, Esq. and Ngozi Olehi, Esq.) - for the 4th – 2891st Respondents

CASES REFERRED TO

Anadi v. Okoli (1977) 7 SC 57 at 63

Adeleke v. Asani (2002) 4 S.C. (Pt. II) 125 at 138

FK.I.N. v. Gold (2001) 11 NWLR (Pt. 1044) 1 at 19

Obi v. IN EC (2007) 11 NWLR (Pt. 1046) 565 at 635

Ibrahim v. INEC (1999) 8 NWLR (Pt. 614) 334 at 351

Okobia v. Ajanya (1998) 6 NWLR (Pt. 554) 348 at 360

Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129 at 138

Awuse v. Odili (2003) 18 NWLR (Pt. 85 1) 116 at 157

Thomas v. Olufosoye (1986) 1 NWLR (Pt. 18) 669 at 671

Maduekwe v. Okoroafor (1992) 9 NWLR (Pt. 263) 69 at 41

Obot v. Central Bank of Nigeria (1993) 10 SCLJ 268 at 284

Onyekwuluje v. Animashaun (1996) 3 NWLR (Pt. 439) 637 at 644

Fregene v. U.A.C. Nig. Limited (1997) 3 NWLR (Pt. 493) 359 at 365

Notes v. Donaster Amalgamated Collieries Ltd. (1940) A.C. 1014

Amgbare v. Chief Timipre Sylva (2009) 1 NWLR (Pt. 1121) 1 at 43

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, ss. 2, 179, 182, 192, 208 and 318

Electoral Act, 2006, ss. 28, 32, 141, 145, 146 and 149

Evidence Act, cap 112, L.F.N., 1990, s. 137

B Court of Appeal Rules, 2007, O. 6 r. 2

Electoral Tribunal and Court Practice Directions 2007, paras 1& 5

Supreme Court Rules, O. 8 r. 2

LEAD JUDGMENT BY IBIYEYE JCA

C This appeal was prompted by the judgment of the National Assembly/ Governorship and Legislative Houses Election Petition Tribunal Umuahia in Abia State delivered on the 25th February, 2008.

D At the election which took place in all the constituent States of the Federal Republic of Nigeria and particularly in Abia State on the 14th of April, 2008, the Peoples Democratic Party (PDP) and the Peoples Progressive Alliance (PPA) respectively fielded Chief Onyema Ugochukwu and Chief Theodore Ahamefule Orji and their Deputies as their candidates for the said election. It is worthy of note that the
E nineteen other parties sponsored candidates for the same election.

At the close of voting and particularly the day after, that is to say on the 15th day of April, 2007, one Mr. E. E. Enabor announced the results that the candidate of the PPA, Chief T. A. Orji, is returned
F as the elected Governor of Abia State by scoring 265,389 votes while the candidate of the PDP, Onyema Ugochukwu, came second with 136,858 votes.

Chief Onyema Ugochukwu, one of the candidates for the Gubernatorial seat of Abia State and his prospective deputy to that
G office, Hon. Chinwendu Nwanganga, were dissatisfied with the results announced by the Independent National Electoral Commission (INEC) and filed two petitions similarly dated 11th May, 2007 but differently and respectively filed on 12th May, 2007 and 14th May, 2007. The two petitions earlier on referred to are numbers ABS/
H GOV/EPT/4/0/2007 filed by Chief Onyema Ugochukwu and Hon. Chinwendu Nwanganga and ABS/GOV/EPT/9/2007 filed by the Peoples Democratic Party. I have perused the contents of the two petitions and I found that they are almost similar in wording.

I shall reproduce here under the averments in Petition No. ABS/

GOV/EPT/4/2007 which I consider of particular moment in the petition filed by Chief Onyema Ugochukwu and Hon. Chinwendu Nwanganga. Thus paragraphs A1, 2, 3, 4, 5 and 6 as well as B1, 2 and 3 read:-

“(A) The petitioners are Onyema Ugochukwu and Hon. Chinwendu Nwanganga whose names are hereunder subscribed: B

(a) Your petitioners Onyema Ugochukwu and Hon. Chinwendu Nwanganga state that they are candidates at the above named election and claim to have had a right to be returned at the above election and your petitioners state that they were the persons who were duly elected in that election for the office of the Governor and Deputy Governor respectively for Abia State of Nigeria in that Governorship General election held in Abia State on Saturday, 14th April, 2007 when the candidates and their parties were as follows: C

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|-----|-----------------------------------|---------------------|---|
| 1. | <i>Dr. Ephraim Iroakazi</i> | <i>AA</i> | D |
| 2. | <i>Hon. Iheanacho Obioma</i> | <i>AC</i> | |
| 3. | <i>Chief Uche Ihedigbo</i> | <i>ADC</i> | |
| 4. | <i>Emenike Ikechi</i> | <i>ANPP</i> | |
| 5. | <i>Uzodinma Chimereze Okpara</i> | <i>APGA</i> | E |
| 6. | <i>Chief Barr. Nnamdi Uchendu</i> | <i>APS</i> | |
| 7. | <i>Nac Anthony Nwaihu</i> | <i>BNPPP</i> | |
| 8. | <i>Chief Samuel Chukwuma Eke</i> | <i>CPP</i> | |
| 9. | <i>Ugwu Chris Chibuzo</i> | <i>DPP</i> | F |
| 10. | <i>Obioma Onyeaghala</i> | <i>Fresh</i> | |
| 11. | <i>Chukwu Nwachukwu</i> | <i>Labour Party</i> | |
| 12. | <i>Christian U. Wogu</i> | <i>NAP</i> | |
| 13. | <i>Navy Capt. Jerry O. Ogonna</i> | <i>NPC</i> | G |
| 14. | <i>Kingsley Onyekwere Uluocha</i> | <i>NDP</i> | |
| 15. | <i>Onyema Ugochukwu</i> | <i>PDP</i> | |
| 16. | <i>Orji Theodore Ahamefule</i> | <i>PPA</i> | |
| 17. | <i>Chukwu Benedict Agoh</i> | <i>RPN</i> | |

(b) Each of the petitioners is a registered voter and they each member (sic) of the Peoples Democratic Party (PDP). They are each duly nominated and sponsored for that election by the PDP whose candidates they were for the election. They are each resident in Umule Ohuhu, Umuahia North Local Government Area and Umuagara, Ihie Village, Ihie Iyi Autonomous Community, Ugunagbo Local Government Area, Abia State respectively. H

(c) The 1st petitioner was a Senior Special Assistant to the President of the Federal Republic of Nigeria and was also the Executive Chairman Niger Delta Development Commission (NDDC). He duly resigned from office to contest the election.

The 2nd petitioner was once the Chairman of the Ugwuagbo Local Government Council of Abia State.

2(a) The 1st respondent was put forward by PPA as its candidate for the office of Governor of Abia State in that election while the 2nd respondent was put forward by the same party as its candidate for the office of Deputy Governor. Before the election, they were in the public service of Abia State.

(b) The 2nd respondent was at all material times a civil commissioner in the Executive Council of Government of Abia State

(c) The 3rd respondent is a political party registered in Nigeria.

3(a) The 4th respondent is a body Corporate established by statute to organize and to conduct general elections in Nigeria including that election for the office of Governor held in Abia State on Saturday 14th April, 2007.

(b) The 5th respondent is the Resident Electoral Commissioner for Abia State and he supervised the election in Abia State for the 4th respondent. He is the appropriate returning officer specified by the statute for that Governorship election in Abia State.

(c) The 7th to 2893rd respondents were the various respective electoral officers, returning officers for the respective Local Government Areas, Wards and Polling Stations (Polling Booths) of that election held in Abia State on 14th April, 2007 and that is to say the Local Government Areas, wards and Polling Stations listed in the heading of the parties in this petition.

(d) The 5th to 2895th respondents except Prince Emonye were the agents of the 4th respondents (sic) in that election.

4(a) At the close of that election, the final votes purported to have been scored by each of the candidates are as follows:- (I shall reproduce only first five highest votes).

S/N	Candidate	Party	Score
1.	Dr. Ephraim Iroakazi	AA	3868
6.	Emenike Ikechi	ANPP	36374
7.	Uzodinma Chimereze Okpara	APGA	27425
18.	Onyema Ugochukwu	PDP	136858

19. Orji Theodore Ahamefule PPA 265389

The total number of votes cumulatively scored by the candidates in that election as announced by INEC is 479377.

(b) The total number of registered voters in Abia State is 1,380,539 voters. The INEC register of voters in Abia State is pleaded and notice is given to INEC to produce same. The register of voters for each INEC polling stations (sic) wards (sic) and Local Government Areas (sic) in Abia State are pleaded. B

6(a) At the close of voting on the date of the election and before the final completion of collation, one Mr. E.E. Enabor who has been joined as a respondent in this petition purported to have announced on Sunday 15th April, 2007 that the candidate of PPA - Chief T. A. Orji is returned as the elected Governor of Abia State in that election. If his said announcement of result were valid then the result of the election was declared/announced on 15th April, 2007. C D

(b) The said Mr. E. E. Enabor was never the appropriate Returning Officer for the Governorship election on 14th April 2007 held in Abia State. He is the Head of Department of Legal/Public Affairs, INEC Abia State. Oral and documentary evidence shall be led at the trial in support of this fact. The petitioner shall contend at the trial that the declaration of result made by Mr. Enabor is void. E

(c) The appropriate returning officer for the Governorship for that election is the Resident Electoral Commissioner, Abia State at the material time was Mr. Solomon Soyebi and he did not announce the result of that Governorship election held in Abia State on the 14th day of April, 2007. He never signed any certificate of return referable to that election. The certificate of return dated 15th April, 2007 and purported (sic) signed by Mr. Solomon Soyebi and more particularly the copy thereof issued to the police and agents of the political parties is hereby pleaded. Notice is given to INEC to produce the counterpart copy kept by INEC. F G

Grounds on which the petition is brought:

The grounds on which this petition is brought are as follows:

1. The 1st and 2nd respondents were as at the date of the election each not qualified to contest as candidates for the election to the office of Governor/Deputy Governor of Abia State and the petitioners so informed the electorate during their campaign for that election. H

2. *The result/return from the election has not been announced/declared by the appropriate Returning Officer for that election.*

3. *The petitioner scored majority of lawful votes cast in that Governorship/House of Assembly general election held by INEC in Abia State on the 14th day of April, 2007 and ought to have been returned as elected being that they also scored at least one-quarter of all the votes cast in each of at least two-thirds of all the Local Government Areas of Abia State. But the 1st and 2nd respondents were wrongfully declared and returned as elected.*

The petitioners shall contend as an alternative ground that: The election is void being that it was not conducted in substantial compliance with the provisions of the Electoral Act, 2006 and the guidelines, rules and regulations enacted and prescribed for the election being that:

(i) the respondents committed and/or procured substantial malpractice in substantial part (sic) of the election; and

(ii) the respondents committed substantial irregularities which rendered the election void.” On the basis of the aforementioned grounds, the petitioners prayed for the following reliefs:

(i) That the 1st and 2nd respondents were not qualified to contest as the candidates for PPA in that election held on 14th April, 2007 being that:

(a) The 1st respondent indicted by an Administrative Panel set up by the Federal Government and the Federal Government accepted that indictment.

(b) The 1st respondent was stayed from contesting that election by the Federal High Court, Kaduna in suit No. FHC/KD/CS/39/2007.

(c) That the 1st and 2nd respondents remained employed in the public service of Abia State up to a period of less than one month preceding the date of the election.

(d) The 1st respondent is a member of a secret society.

(e) The 2nd respondent’s qualification to contest as a candidate in that election was removed by the non-qualification/disqualification of the 1st respondent.

(ii) That following the disqualification of the 1st and 2nd respondents, whether known or deemed to be known to the voters at the time of the election, all votes cast for the 1st and 2nd respondents

as the candidates of the *Progressive People Alliance* are void.

(iii) That the result of the election to the office of Governor and Deputy Governor in that election held on the 14th day of April, 2007 for Abia State can only be declared and announced (at the election) by the appropriate returning officer who in this case is the Resident Electoral Commissioner, Abia State and not Mr. E.E. Enabor. ^B

(iv) That the result of the governorship general election held on the 14th day of April, 2007 has no been duly and, properly announced.

(v) That the announcement of the 1st and 2nd respondents by Mr. E. E. Enabor as the persons elected in that general election to the office of Governor and Deputy Governor of Abia State be set aside. ^C

(vi) That the petitioners having scored the majority of lawful and valid votes in that Governorship/ House of Assembly General election held by INEC in Abia State on the 14th day of April, 2007 and having scored at least one-quarter of the valid votes cast in at least each of two-thirds of the Local Government Areas of Abia State be returned as the persons elected to the office of Governor and Deputy Governor of Abia State.” ^E

In reply to the petition, the 1st, 2nd and 3rd respondents who are described as the 1st set of respondents filed an eighty-seven paragraph reply in which they admitted only paragraphs 4 to 11 of the petition and meticulously denied the remaining paragraphs of the petition. The 1st, 2nd and 3rd respondents prayed that the petition be dismissed on the ground that: ^F

“(a) *It lacks merit.*

(b) *The tribunal lacks jurisdiction to entertain it having regard to the petitioners’ failure to comply with section 145 of the Electoral Act, 2006 and to take the steps statutorily prescribed under section 32(4) of the Electoral Act, 2007.”* ^G

The 4th to 2894th respondents also referred to as the 2nd set of respondents filed a reply of six quite elaborate paragraphs to the averments in the petitions. I have studied the state of the record and I am of the opinion that it will make for elucidation and case of reference to reproduce the six salient paragraphs. The said paragraphs read: ^H

“1. *EXCEPT AND SAVE as is herein expressly admitted the*

4th to 2894th respondents (hereinafter called the respondents) hereby deny each and every allegation of fact contained in the petition as if they were specifically set down and traversed seriatim.

2. Part A and paragraphs 1 (a)(b)(c), 2(a)(b)(c), 3(a)(b)(c), 4(a)(b) of the petition are hereby admitted except to state that:

B (a) The petitioner's candidate did not score the majority of lawful votes cast at the Governorship election held in Abia State on 14th April, 2007 and therefore do not have the right to be declared elected and returned.

C (b) The 1st and 2nd respondents duly resigned their respective positions in the public service of Abia State before contesting the election and they duly and fully satisfied the 4th respondent in that respect during the screening exercise.

D (c) Not all that were originally scheduled to participate in conducting the election in issue in the capacities of the 6th and 2894th respondents were finally employed by the 4th respondent to participate in conducting the said Governorship election as many supervisors, returning officers and presiding officers originally scheduled to participate in conducting the election were later changed either because they were found to be members of one political party or the other or failed to report for the election duties, etc.

F (d) Every staff whether permanent or ad hoc who eventually participated in conducting the election was duly appointed by the 4th respondent in that behalf and therefore had the due authority of the 4th respondent to function in the office he or she functioned.

G (e) The register of voters used for the Governorship election is the same used for the Presidential and National Assembly elections and by the order of the Court of Appeal, the register had been sent to the Registry of the Court of Appeal for use by Presidential petitioners.

3. Part A paragraphs 6(a)(b)(c) and Part B paragraphs 1, 2, 3(i)(ii) appearing on pages 53-54 of the petition) are hereby specifically denied. In further answer, the respondents state that:

H (a) The Governorship election in Abia State duly held on 14th April, 2007 and on 15th April, 2007.

The 5th respondent who is the statutory returning officer for that election duly collated the final result for the election and personally announced it himself before party agents and the security agents and

declared the 1st and 2nd respondents as duly elected and returned as Governor and Deputy Governor of Abia State respectively. The 5th respondent who in person was Mr. Solomon Soyebi duly signed the result form and issued copies to party agents and security agents.

(b) After the 5th respondent had finished declaring the result and signing the result form and issuing same out as aforesaid the 6th B respondent in whose office it fell to brief the Press, duly briefed the Press and members of the public with regard to the details of the result declared by the 5th respondent.

(c) The 1st and 2nd respondents were before the election duly C screened by the 4th respondent and found to be qualified in accordance with the 1999 Constitution and in particular, found that the indictment of the 1st respondent by the Administrative Panel had been quashed by the Federal High Court in favour of the 1st respondent, both of which were duly served on the 4th respondent before D the election. The judgment and order are hereby pleaded. There were no contrary order or orders or judgments served on the 4th respondent against the 1st and 2nd respondents before the election and there have been none since the end of the election in issue.

(d) The Governorship election in Abia State was peaceful, free E and fair and widely acclaimed to rank among the most peaceful in Nigeria and was conducted substantially in compliance with the Electoral Act, 2006 and the 4th respondent's published guidelines for the election.

(e) The 4th to 2894th respondents shall not see nor receive F any reports of any irregularities, malpractices or anything inconsistent with the provisions of the Electoral Act either committed by the 1st to 3rd respondents or by their agents or by any other persons for that matter.

4. Part C paragraphs 1(a)(i)(ii)(iii)(iv)(v)(vi), (b),(c)(i)(ii), (d), G (e), 2(a), (b), (c), (d), (e), (f)(i)(ii), (g), (h)(i)(ii) are to the best of my knowledge and information of the respondents hereby denied - save to state:

(a) The 1st and 2nd respondents were as aforesaid found by H the 4th respondent to be qualified in accordance with the 1999 Constitution of Nigeria to contest the Governorship election of 14th April, 2007, and that they duly contested the said election and having scored the majority of lawful votes cast at the election were duly declared

and returned by the 5th respondent as winners.

(b) The petitioner's candidate did not score a majority of lawful votes cast at the said election and therefore did not win the election.

B (c) The result of the said Governorship election was duly declared as aforesaid by the 5th respondent and not by the 6th respondent.

C (d) The figures or number of votes the petitioners claim to have scored at the election other than the figures duly declared by the 5th respondent are false and conjured up by the petitioners and any result sheets the petitioner parade as supporting those false figures are equally false and not emanating from the 4th respondent or its staff.

D (e) With the exception of Isiala Ngwa North Local Government Area where the Governorship election was cancelled, elections in the rest of the Local Government Areas in Abia State duly held and the results through the Wards, Local Governments to State collation centres and appropriate electoral materials were provided to the electoral staff and where there were shortfalls they were promptly E filled, re-supplied and corrected.

(f) All the results collated by the staff of the 4th respondent who conducted the election from the polling units to the State collation centre are true and correct and not falsified. And the result sheets F are hereby pleaded.

5. Part C paragraphs 3(a), (b)(i) - (b)(xvi) of the petition are hereby denied and in further answer the respondents state that:

G (a) The petitioner's candidates as aforesaid did not win the election in issue and all the arithmetical projections and permutations with the supporting charts with regard to the false figures of votes the petitioner is claiming to have scored by its candidates at the election, are false in all material particulars and the petitioners shall be put to the strictest proof thereof.

H (b) The catalogue of irregularities and malpractices stated by the petitioners with regard to elections in all the Local Government Areas in Abia State are false and fabricated as none of them except as aforesaid occurred to the knowledge, information and/or experience of the 4th respondent and its staff during the election in issues.

(c) No thugs whether for the 1st to 3rd respondents or for any

other party or candidates were seen

“during the election either harassing voters or opponents from other parties, or falsifying results or carrying ballot boxes to unlawful ; places.

(d) There were no incidents of over voting or inflation, of results noticed or committed by the respondents.

(e) The results of the election were not written by the same person and there is no incident of one person writing more than one result for any reason whatsoever including benefiting the 1st to 3rd respondents.

(f) The elections in all the Local Government Areas in Abia State, except as aforesaid, were conducted normally, peacefully and in substantial compliance with the Electoral Act. The results from the polling units to the State collation centre were duly collated and declared without any hindrances. The results were declared at the appropriately designated collation centres.

(g) The respondents did not give out materials meant for the election in issue to anybody other than the legitimate staff of the 4th respondent chosen to conduct the election.

(h) The respondents never received any reports of malpractices and/or irregularities either from the police, the other security agencies or even from the participating political parties, except a few report from the staff of the 4th respondent regarding minor incidents here and there but which in the sum total did not affect the election substantially.

(i) The petitioners’ allegation of result falsification by the respondents and/or indeed by any other persons for that matter are false in all material particulars and fabricated mainly to shore up their largely specious, fictional speculative and theoretical election petition.

(6) The petitioner is not entitled to the reliefs claimed in this petition and at the hearing, the respondents shall urge the Honourable Tribunal to dismiss the petition for being incompetent and grossly lacking in merit and to confirm the return of the 1st and 2nd respondents.”

It is pertinent to point out that there is no need to set out the reply of the 1st set of respondents to the 1st Petition No. ABS/GOV/EPT/4/2007 because the averments therein are strikingly the same as in Petition No. ABS/GOV/EPT/9/2007. In view of the similarity of the averments in the two said petitions (supra) the two sets of petitioners

sought and got leave of the tribunal to consolidate them (the two petitions).

On the 3rd day of October, 2007 the petitioners opened their case in petition No. ABS/GOV/EPT/4/2007 by calling the petitioner who testified as the PW1 by adopting his sworn depositions and through whom a number of documents which were mainly Forms EC8A and EC8B, EC8C, EC8D and EC8E were severally admitted as exhibits. Twenty-one other witnesses including in particular PW5 adopted their sworn depositions in strict compliance with the Practice Directions No. 1 of 2007. All the petitioners' witnesses were severally cross-examined by the learned senior counsel for the respondents.

It is of moment to note that when the PW5, Isaac Olisabueze Okolie was to testify the two sets of petitioners agreed, albeit through their learned counsel, that the petitions having been consolidated only a single line of witnesses should be called. It is pertinent to note that the sworn depositions of both the PW1 and the PW5 were very extensive. The two sets of petitioners sworn depositions were based on the single line of witnesses approved closed their case on the 12th day of November, 2007.

On the 22nd day of November, 2007, the 1st set of respondents opened their defence. The said set of respondents called only three witnesses who included the 2nd respondent. Chris Alozie Akomas, the Deputy Governor of Abia State. All the three witnesses were cross-examined by the learned counsel of the two sets of petitioners.

At the close of the case for the 1st set of respondents, the 2nd set of respondents opened their case by calling only one witness that is to say E. E. Enabor, being the head of Legal and Public Affairs Department of the respondent (INEC). The only said witness for the 2nd set of respondents informed the tribunal that he represented the 4th to 2890th respondents. His sworn deposition/testimony was admitted as exhibit LE and was thereafter cross-examined by the two sets of petitioners. The two sets of respondents closed their defence.

At the instance of the tribunal the parties to the consolidated petitions in compliance with paragraph 5(11) to (14) of the Practice Directions of 2007 filed their written addresses on the 8th of January, 2008. The parties, in their written addresses, raised a number of issues for the consideration of the tribunal.

In its considered judgment, the tribunal made several findings in respect of the three issues before it for determination. The findings in respect of issue No.1 are as follows:

"We have at this stage considered the submissions of all the parties to this petition on the first issue for determination on whether the 1st and 2nd petitioners have scored the highest number of lawful votes cast in the questioned election and not less than one quarter of all the votes cast in each of at least two thirds of all the Local Government Areas in Abia State.

We have seriously noted the submissions of the parties on this issue especially where the 2nd set of petitioners submitted at page 37 of their written address that "The petitioners applied for and secured some certified copies of statements of results. Those results are the 2nd set of results. They also tendered copies of results served them by the respondents in this petition. The petitioners are thus able to stigmatize one set of results as against the others. We wish to state that the results tendered and which the petitioners wish to rely upon to challenge the return of the 1st respondent based on the results of the electoral body in this respect, the Independent National Electoral Commission (INEC) are hearsay evidence by virtue of lack of proper cross-examination of the said documents in open court as courts and tribunal also are enjoined, namely by agents or makers of the said documents tendering same and being cross-examined by the contending parties. It is on record that the PW1, in the person of 1st petitioner admitted receiving the said results which he relied upon from his party's agents and are in evidence before this tribunal from exhibits KK series for Abia North Local Government Area to exhibits HQ series for Umunneochi Local Government Area. Having admitted receiving such documents from his agents, this presupposes that he was not present during the making of the documents. It is for this reason that we share and agree with the submission of the learned silk of counsel to the 2nd set of respondents on his branding the entire testimony of the PW1 as hearsay.

The said result sheets could be tendered in evidence in accordance with the rules of procedure governing the conduct of proceeding at an election tribunal. What is not permitted is for such documents to be tendered by parties during the hearing of the petition without calling witnesses capable of testifying as to the contents of

such documents.

The above scenario is the one dealt with by the courts in relation to evidence of witnesses that are regarded as hearsay and unacceptable for the purpose of testifying on the results of the election tendered by the contending parties. It is in view of the foregoing that we wholly support the argument and final submission of counsel to the second set of respondents that "There is no basis in law for the petitioners to contest the validity of Forms EC8A and EC8B upon which the return of the 1st respondent was based or stigmatize the said Forms as falsified

We finally on this issue hold that the petitioners have failed to prove that the 1st and 2nd petitioners have scored majority of lawful votes cast at the election to enable them being returned as duly elected. Issue number one is resolved in favour of the two sets of respondents. We now go to issue number two which is "Whether the election of 1st respondent is voided by substantial malpractices."

On issue number two the tribunal highlighted the irregularities and malpractices and went on to further hold:

"Under cross-examination the petitioner who testified as PW1 stated that he cannot state the number of polling booths where results were inflated and reduced by Independent National Electoral Commission. INEC did not give them the full results sheets at the election.

The other witnesses called by the petitioners did not also testify favourably on this aspect. It is in view of the above that we hold that as the petitioners could not show substantial compliance with the provision of the Electoral Act and that the said non-compliance has substantially affected the election, we hold that by the provision of section 146 of the Electoral Act the petitioners have failed to prove that the questioned election is voided by malpractices.

In view of the foregoing, we hereby resolve issue number two in favour of the two sets of respondents."

On the third ground, which is on the alleged membership of respondent of Okija secret society, the tribunal held in part as follows:

"We have considered the submissions of all the parties to this petition with regards to (sic) the evidence adduced by the two sets of petitioners on this ground of the 1st respondent's alleged membership of Okija secret society. We are of the candid view that the two

sets of respondents did not succeed in controverting the evidence adduced by the two sets of petitioners especially the sworn depositions of the PW5 which the second set of petitioners referred to on page 16 paragraph 25.11 of their written address.

The PW5 in this testimony portrayed himself as a witness of truth by his demeanour and outward disposition throughout the time he was cross-examined. B

In view of the above, we hold that having considered the pleadings of the parties and evidence adduced, the two sets of petitioners have proved that the 1st respondent is a member of Okija secret society. In view of this, we resolve this third and last issue for determination in favour of the petitioners. C

We hereby order that the 1st petitioner in the first petition No. EPT/GOV/04/2007 and 2nd petitioner be and are hereby declared and returned as the duly elected Governor and Deputy Governor of Abia State having scored the second highest lawful votes cast at the election after the disqualification of the 1st and 2nd respondents.

As this is a consolidated petition, we find it mandatory to give our judgment in petition No. EPT/GOV/9/2007. This tribunal has considered the pleadings and the evidence adduced by the second set of petitioners. The similarity in the two petitions namely EPT/GOV/4/2007 and EPT/GOV/9/2007 made the consolidation of the two petitions mandatory as enjoined by paragraph 46 of the First Schedule to the Electoral Act, 2006. It is on record that in view of the consolidation, the two sets of petitions resorted to adopting a single line of witnesses thereby whatever we hold in petition No. EPT/GOV/4/2007 is equally applicable to petition No. EPT/GOV/9/2007. E
F

It is for this reason that we hold that the reliefs sought by the second set of petitioners in EPT/GOV/9/2007 are hereby granted. The return and declaration of the 1st and 2nd respondents as Governor and Deputy Governor of Abia State be and are hereby nullified. The petitioners' candidates are the 1st and 2nd petitioners in EPT/GOV/4/2007 be and are hereby duly returned and declared as the Governor and Deputy Governor of Abia State." G
H

The appellants were utterly dissatisfied with the judgment of the trial tribunal and appealed to this court. This judgment precipitated seven appeals, which were separately numbered CA/PH/EPT/197/2008, CA/PH/EPT/197A/2008 to CA/PH/EPT/197F/2008.

These appeals for the sake of clarity and ease of determination are separately considered and determined by this court. The instant judgment appertains to appeal No. CA/PH/EPT/197/2008. There are two petitions in this appeal. They are petition No. ABS/GOV/EPT/4/2007 and ABS/GOV/EPT/9/2007. Both petitions were consolidated by the trial tribunal at the instance of the two sets of petitioners who were Onyema Ugochukwu and Hon. Chinwendu Nwanganga in petition No. ABS/GOV/EPT/4/2007 and Peoples Democratic Party in petition No. ABS/GOV/EPT/9/2007.

In view of the consolidated two sets of petitions which were tried and judgments entered in favour of the petitioners, the 1st and 2nd respondents who are now the 1st and 2nd appellants filed two sets of notices of appeal against the judgments in petition No. ABS/GOV/EPT/4/2007 and No. ABS/GOV/EPT/9/2007 on the same date on 11th March, 2008. The former notice of appeal contained twenty-four grounds of appeal while the latter notice of appeal contained twenty-three grounds of appeal.

It is apparent from the available records in this appeal that the appellants that is to say the 1st and 2nd appellants filed a joint brief of argument in respect of petition No. ABS/GOV/EPT/4/2007 without any brief of argument filed in respect of the judgment delivered in petition No. ABS/GOV/EPT/9/2007. ***It is now very well settled that appeals are heard by the appellate court or briefs of argument wherein issues are raised from the grounds of appeal identified by the appellants or their learned counsel. The purpose of formulating issues in a brief of argument is to isolate from the grounds of appeal filed the critical issues relevant for the determination of the appeal. It is fatal for an appellant in particular to raise grounds of appeal without identifying issues for the determination of the appeal. The consequence is that such grounds of appeal are deemed abandoned. It is also instructive to state the settled law that arguments in briefs of argument should be based on issues raised from the grounds filed and not on the grounds themselves. That is part of the essence of brief writing (See Fregene v. U.A.C. Nig. Limited (1997) 3 NWLR (Pt. 493) 359 at 365) It stands to reason in the prevailing circumstances of this appeal that the appellants in petition No. ABS/GOV/EPT/9/2007 did not intend to rely on any***

brief of argument if they could file a brief of argument in the appeal against the judgment in petition No. ABS/GOV/EPT/4/2007 without one for petition No. ABS/GOV/EPT/9/2007. I agree with the learned counsel for the respondents in the instant appeal that the grounds of appeal thereat have been abandoned and the grounds are accordingly struck out See ^B Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129 at 138.

Aside the foregoing observations, the learned counsel for the parties filed and exchanged their respective briefs of argument.

Chief Wole Olanipekun, the learned senior counsel leading ^C several learned senior counsel and learned counsel distilled the following ten issues from the twenty four grounds of appeals on behalf of the two appellants for the determination of the appeal:

“(i) Having regard to the clear pleadings backed by the reliefs of the petitioners/1st and 2nd respondents to the effect that the result of the election had not been announced/declared as at the time the petition was filed, whether or not the condition precedent for the filing/presentation of an election petition had arisen or crystalised to warrant the presentation of the petition by the petitioners and for the lower tribunal to assume jurisdiction on same. (Ground 1) ^E

(ii) Whether or not within the context and interpretation of section 182(1)(9) of the Constitution of the Federal Republic of Nigeria, 1999, read together with section 318(1) of the same Constitution, 1st and 2nd appellants were, at the time of election, employees ^F in the public service of a State (Abia State) to warrant their resigning from their employment at least 30 days to the date of the election. (Ground 2)

(iii) Even if the answer to issue (ii) supra is in the affirmative, whether or not having regard to the pleadings and evidence placed ^G before the lower tribunal, the lower tribunal was not in grave error to have held and concluded that the appellants breached and/or were disqualified from contesting the election by section 182(1)(g) of the Constitution. (Grounds 3, 4, 5, 6, 7, 8 and 9)

(iv) Considering the pleadings of the petitioners/1st and 2nd ^H respondents vis-a-vis the inadmissible evidence tendered by them, whether or not it was established before the lower tribunal that Okija shrine is a secret society within the ambit, context and definition of section 182(1)(h) read together with section 318(1) of the 1999 Con-

stitution. (Grounds 14 and 15)

(v) Having regard to the state of the pleadings of the appellants vis-a-vis the mandatory provision of paragraph 1(l)(c) of the Election Tribunal and Court Practice Directions, 2007 (Practice Directions) and the inadmissible evidence proffered by the petitioners/
 B 1st and 2nd respondents, whether sufficient materials were placed before the lower tribunal for it come to the conclusion that the 1st appellant was a member of Okija secret society. (Ground 10, 11, 12, 13, 17 and 19)

(vi) Having regard to the specific jurisdiction of the lower tribunal as prescribed and circumvented by section 285(2) of the Constitution coupled with the fact that the twin issues of non-resignation of appellant from the public service of Abia State and the purported membership of the 1st appellant of Okija secret society are pre-election matters, whether or not the lower tribunal had jurisdiction to entertain the said issues and nullify appellants' election on same. (Grounds 16 and 23)

(vii) Whether or not the lower tribunal was not in serious error occasioning a miscarriage of justice:

E (a) by allowing petitioners in consolidated EPT/ H GOV/4/ 2007 and EPT/GOV/09/2007 to adopt and call a single line of witnesses;

(b) by allowing and adopting a witness (PW5) whose witness
 F (sic) statement was attached only to the reply in EPT/GOV/09/2007 as a witness in EPT/GOV/04/2007

(c) by not giving judgment for and in each of the two consolidated petitions and/or

(d) by not considering each of the two petitions, before adopting
 G judgment in one for the order. (Ground 21)

(viii) Considering the reliefs claimed by the petitioners/1st and 2nd respondents, the faultless finding of the lower Tribunal that the appellants scored majority of lawful votes cast at the election and the mandatory provisions of section 179(2)(a)(b) of 1999 constitution, whether or not the lower tribunal's decision returning the 1st petitioner/1st and 2nd respondent as the winner of the election to the office of the Governor of Abia State on the 14th April, 2007 is not
 H perverse and highly erroneous. (Grounds 18 and 20)

(ix) Assuming without conceding that the lower tribunal was

even right in its decision relating to non-resignation from office of the 1st and 2nd appellant 30 days to the election and the purported membership of the 1st appellant of the Okija secret society, whether or not the election of the appellants is not saved by the mandatory provisions of section 146(1) of the Electoral Act, 2006. (Ground 22)

(x) Considering the entirety of the pleadings, the admissible evidence led before the lower Tribunal and the circumstances of this case, whether or not the judgment of the lower Court is not altogether erroneous - Ground 24."

The following five issues were adumbrated from the twenty four grounds of appeal by D.C. Denigwe, Esq. and other learned counsel on behalf of the 1st and 2nd respondents for the determination of the instant appeal:-

"(i) Whether the petition was competent, if so, was the lower tribunal competent to inquire into the allegations of non-qualification/disqualification of 1st and 2nd respondents/ appellants based on the provisions of section 182(1)(g) (h) of the constitution of the Federal Republic of Nigeria 1999. (Grounds 1, 6 and 23 of the appellants' grounds of appeal)

(ii) Whether the lower tribunal was right when it came to the conclusion that the 1st and 2nd appellants did not resign their appointment (sic) from the public service of Abia State at least 30 days before the date of the election. (Grounds 2, 3, 4, 5, 6, 7 and 8 of the appellants' grounds of appeal)

(iii) Whether the lower tribunal was right when it came to the conclusion that the 1st respondents/appellants was qualified (sic) from contesting the election under section 182 (h) of the Constitution of the Federal Republic of Nigeria, 1999 on the ground that based on the evidence before the lower tribunal the 1st respondents/appellants is a member (sic) of a secret society, the Okija secret society. (Grounds 9, 10, 11, 12, 13, 14, 15 and 19 of the appellants' grounds of appeal).

(iv) Whether the lower tribunal was justified when it came to the conclusion that the petitioners/respondents were entitled to be returned as winners of the election. (Grounds 18, 20 and 24 of the appellants' grounds of appeal).

(v) Whether in view of the fact the petition in this case was

consolidated, the tribunal was right in its approach to the evidence and the tendering of its judgments (sic). (Ground 21 of the appellants' grounds of appeal).

The two other sets of respondents, that is to say the 3rd respondent and the 4th to 2891st respondents who were respectively represented by Prince L. O. Fagbemi, SAN and Livy Uzoukwu, Esq, SAN did not file any brief of argument.

On the 25th day of November, 2008, being the day set down for the hearing of the appeal. E.G. Ukala, Esq., the learned senior counsel for the 1st and 2nd respondents referred the court to the fact that the 1st and 2nd respondents raised a preliminary objection in their joint brief of argument. The promptitude with which the learned senior counsel for the 1st and 2nd respondents raised the issue of the preliminary objection embedded in their said brief of argument is in keeping with the attendant principle which states that it should be mentioned for consideration so soon as the appeal is called for hearing. See *Ndigwe v. Nwude* (1999) 11 NWLR (Pt. 626) 314 at 331.

The principle on preliminary objection is now very well established that a court is duty bound to express in writing whether it agrees with the preliminary objection or not. It is a cardinal principle of administration of justice to let a party know the fate of his application whether properly or improperly brought before the court. It would amount to unfair hearing to ignore an objection raised by party or his counsel against any such step in the pleadings. It is also a pertinent principle that an appellate court should first consider a preliminary objection raised during an appeal. This is because if successful, a preliminary objection has the effect of disposing the appeal partly or wholly and the matter ends. See *Amgbare & Anor. v. Chief Timipre Sylva & Others* (2009) 1 NWLR (Pt. 1121) 1 at 43; *Tambco Leather Works Ltd. v. Abbey* (1998) 12 NWLR (Pt. 579) 548 at 554 and 555; *Onyekwuluje v. Animashaun* (1996) 3 NWLR (Pt. 439) 637 at 644.

In view of the foregoing principles on preliminary objection, I shall accord the instant preliminary objection a preferential treatment over and above the issues raised for consideration and determination of the appeal by the parties in their respective briefs of argument. Thus, the notice of preliminary objection dated 14th day of May, 2008 and filed on the 20th of May, 2008 reads in substantial

parts:-

“TAKE NOTICE that this honourable court shall be moved on Monday the 26th day of May, 2008..... as the 1st and 2nd respondents or counsel on their behalf may be heard praying the court for an order setting down and determining as a preliminary issue that:

(a) Grounds 1, 10, 11, 12, 13, 19 and 21 of the appellants/ B respondents’ grounds of appeal are not competent.

(b) Issues Nos. (i), (v) and (vii) formulated from those grounds of appeals are not competent.

(c) Grounds 1,2, 4, 5, 6, 7, 11, 12, 13, 19 and 21 appellants’ C issues Nos. (i), (ii), (iii), (v) and (vii) be struck out for want of competence.

Grounds for the application:

The grounds for the application have been set out and canvassed in the 1st and 2nd respondents/appellants’ brief of argument D and that is to say:-

(i) Ground 1 is a complaint against an interlocutory decision against which no timeous appeal was filed. The ground is thus incompetent.

(ii) Grounds 10,11,12,13,19 and 21 are complaints against E interlocutory decisions in respect of which no timeous appeal was filed. The grounds are thus incompetent.

(iii) Grounds 1, 2, 4, 5, 6, 7, 11, 12, 13, 19 and 21 complain of misdirection in law when none of those grounds constitute a complaint of a misdirection in law (sic). F

(iv) Issues nos. (i), (ii), (iii), (v) and (vii) are distilled from incompetent grounds. They are therefore incompetent...”

The learned senior counsel for the 1st and 2nd respondents, E. C. Ukala, Esq. in oral amplification of the 1st and 2nd respondents’ G joint brief of argument said that the preliminary objection is supported by five paragraphs affidavit and reliance is placed on all of them (the five paragraphs). He equally adopted and relied on the arguments on pages 10 to 20 of the brief of argument of the 1st and 2nd respondents dated 8th May, 2008 and filed on 9th May, 2008. H The learned senior counsel for the 1st and 2nd respondents referred to ground 1 of the grounds of appeal which reads in part:-

“1. The lower tribunal misdirected itself in law by entertaining and countenancing the petition filed by the petitioners before it, thus

nullifying the election and return of the appellants.

WHEN:

(i) *By ground 2 of the petitioners' petition it was/is clearly averred thus:-*

B *"The result/return from the election has not been announced/ declared by the appropriate returning officer for that election.*

(ii) *In paragraph 2(a) and (b) of the same petition, petitioners further averred that the result of the election were (sic) yet to be declared"*

C The learned senior counsel for the 1st and 2nd petitioners/ respondents submitted that the object of this ground is to secure a pronouncement that going by the petitioners' petition, the result of the election was not declared by the appropriate returning officer for that election. He contended that this was the same ground relied D upon by the 1st and 2nd appellants in the motion they brought before the trial tribunal when they challenged the competence of the petition and indeed the competence of the said tribunal to entertain the petition. The tribunal considered that motion and struck it out. The appellants repeated the same motion before the tribunal which E refuses to be drawn into a process of repeating its earlier ruling. He argued that this ground of appeal raised by the appellants in the instant appeal did not arise from the judgment appealed against. They did not appeal against the earlier ruling. He referred to the decision F of the Supreme Court in the case of Ikweki v. Ebele (2005) 2 SC (Pt. 110) 96 at 106 to 110; (2005) 11 NWLR (Pt. 936) 397 where it held that:

G *"it was a well settled proposition of law in respect of which there can hardly be any departure that the grounds of appeal against decision must relate to the decision and should constitute a challenge to the ratio of the decision."*

H He argued along the line of the decision in that case that the instant ground of appeal did not emanate from the judgment appealed against. He conceded, however, that the issue of jurisdiction can be raised at any stage of a proceeding and even for the first time at the apex court.

In response to the arguments proffered by the learned senior counsel for 1st and 2nd respondents on ground 1, the teamed senior counsel for the appellants in the appellants' reply brief argued that

the ground in issue is jurisdictional in nature as it affects the competence of the two suits consolidated by the trial tribunal. He argued that it is not in doubt that ground 1 in the notice of appeal is challenging the jurisdiction of the tribunal as reflected in particular (ix) of the said ground 1 which reads:-

“(ix) Arising from (i), (ii), (iii), (iv), (v), (vi), (vii) and (viii) the lower tribunal lacked the jurisdiction to entertain the petitioners’ petition.” ^B

The learned senior counsel for the 1st and 2nd appellants submitted that despite the objection of the 1st and 2nd respondents they have conceded at paragraph 3.2 at page 13 of their joint brief of argument on the objection to ground 1 that: ^C

“There is no doubt that the issue of jurisdiction can be raised at any time of proceedings and even for the first time at the apex court.” ^D

The learned senior counsel further submitted that in the face of the seemingly glaring fundamental or jurisdictional nature of the complaint in ground 1, the respondents erroneously contented that there must be a pronouncement in the final judgment of the tribunal before this ground (ground 1) can be taken cognisance of by this court. ***He referred to the cases of Ikweki v. Ebele (2005) 2 SC (Pt. 11) 96 at 110; (2005) 11 NWLR (Pt. 936) 397 and S.P.D.C. (Nig.) Ltd. v. X.M. Fed. Ltd. (2006) 7 SC (Pt. 11) 27; (2006) 16 NWLR (Pt. 1004) 189 relied upon by the respondents and submitted that these cases are ordinary civil cases that have little bearing to election petition matters which are sui generis in nature with its procedural rules and law as set out in the Electoral Act, 2006 and the Election Tribunal and Court Practice Directions, 2007 made pursuant to the Constitution of the Federal Republic of Nigeria, 1999. He cited in particular, section 246(1)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as the 1999 Constitution) which stipulates the only right of appeal cognisable from the decision of an election tribunal to this court. This stipulation therefore rules out any other types of decision such as interlocutory decision.*** ^E ^F ^G ^H

He went on to emphasize that the purport of section 246(1)(b)(i)(ii) and (iii) of the 1999 Constitution is

that an appeal can only arise as of right from the decision of an election tribunal which finally disposes off the case without allowing for piecemeal provision on the right of appeal in respect of election petitions as in the ordinary civil or criminal proceedings in which the 1999 Constitution or any other relevant statute has specifically recognized the right to ceaseless interlocutory appeals. See sections 242 and 243 of the 1999 constitution.

I have incisively considered the submissions and arguments proffered by the learned senior counsel for the appellants and the 1st and 2nd respondents and I am of strong opinion that those of the former are more pungent than those of the latter It is only apt at this juncture to reproduce the provisions of section 246(1)(b) of the 1999 Constitution. The provisions reads:-

“246(1) An appeal to the Court of Appeal shall lie as of right from-

(a)
(b) *decisions of the National Assembly/Election Tribunal and Governorship and Legislative Houses Election Tribunal on any question as to whether :-*

(i) *Any person has been validly elected as a member of the National Assembly or House of Assembly of a State under this Constitution.*

(ii) *Any person has been validly elected to the office of the Governor or Deputy Governor; or*

(iii) *the term of office of any person has ceased or the seat of any such person has become vacant.”* (Italics mine for emphasis).

Equally relevant to the application of the foregoing provision as to the time allowed a prospective appellant to avail himself/herself/ itself of the constitutional right of appeal referred to above in election matters is section 149(I) of the electoral act. The said section reads:-

“ 149(1) If the election tribunal or the court, as the case may be, determines that a candidate returned as elected was not validly elected, then if notice of appeal against that decision is given within 21 days from the date of the decision, the candidate returned as elected shall, notwithstanding the contrary decision of the election tribunal or the Court, remain in office pending the determination of the appeal.” (Italics mine for emphasis)

See the cases of Okon v. Bob (2004) 1 NWLR (Pt. 854) 378 at

395; *Usani v. Duke* (2004) 7 NWLR (Pt. 871) 116 and *Amgbare v. Sylva* (2007) 18 NWLR (Pt. 1065) 1 at 19 where this court had opportunities to leave no one in doubt of the futility of rushing to it on interlocutory appeals in election matters when a final decision has not been reached by the tribunal. See section 246(1) of the 1999 Constitution. B

Accordingly, I hold that the objection of the 1st and 2nd respondents fails in respect of ground 1.

As regards the objection raised by the 1st and 2nd respondents to grounds 10, 11, 12, 13, 19 and 20 of the grounds of appeal learned senior counsel observed that a common thread runs through them. The common thread is the complaint in respect of the witness's statement of the PW5 (exhibit "HR"), the admissibility of the evidence of the PW5 and the admissibility of the video clip tendered by the PW5 as exhibit HS. I have perused the submissions and/or arguments canvassed by the learned senior counsel for the 1st and 2nd respondents in support of the series of objections raised to the competence of grounds 1, 11, 12, 13, 19, and 21 of the grounds of appeal and I found the grouse of the 1st and 2nd respondents is that particularly the 1st and 2nd appellants failed to appeal against the several rulings of the trial tribunal before its final decision or judgment was delivered on the 25th February, 2008. The learned senior counsel urged the court, in the circumstances, to strike out those grounds. E

The learned senior counsel referred to issues nos. (i), (v) and (vii) which were formulated from grounds 1, 10, 11, 12, 13, 19 and 21 of the grounds of appeal and submitted that those issues having been formulated from the incompetent enumerated grounds of appeal (supra) are themselves incompetent and liable to be struck out and should be struck out. He cited in aid the cases of *Sosanya v. Onadeko* (2005) 2 SC (Pt. II) 13 at 41; (2005) 8 NWLR (Pt. 926) 185; and *Idika v. Erisi* (1988) 2 NWLR (Pt. 78) 563. F

In response in particular to the observation of the learned senior counsel for the 1st and 2nd respondents on the common thread running through the six grounds (supra), the learned senior counsel for the 1st and 2nd appellants submitted that in spite of the declared concession by the learned senior counsel for the 1st and 2nd respondents and the clear position of the law as to appeals on issue of ad- H

missibility of evidence on appeal, the respondents are contending, albeit erroneously, that because as at the time the evidence of the PW5 and exhibit 'HS' were wrongly admitted in evidence no appeal was filed, the issue cannot be included in the final appeal. He adopted the submissions he made in behalf of the 1st and 2nd appellants in
 B respect of ground 1 (supra) and urged the court to completely disregard the contention of the 1st and 2nd respondents. The learned senior counsel further submitted on this point that once a point is raised challenging the admissibility of a piece of evidence, even though
 C that point was taken during trial and ruled upon before the final judgment was delivered, the point forms part of the judgment of the court for which an interlocutory or a separate appeal is not required and he relied on the case of First Bank of Nigeria Plc. v. Tsokwa (2003) FWLR (Pt. 153) 205 at 223; (2000) 13 NWLR (Pt. 685)
 D 521.

The law on interlocutory rulings in election petitions which is also the live issue in the second phase of objections was exhaustively dealt with while considering the objection to ground 1 of the grounds of appeal. The reasons and conclusions reached thereat are still valid
 E and applicable to the objection to the six grounds set out above and I am wary to expend any valuable time on them. The law on interlocutory rulings in respect of election matters is non-existent. The law instead recognizes one decision and that is the final decision, which
 F admits of appeal. See section 246(1) of the 1999 constitution. Interlocutory rulings can be safely raised in appeal against the final decision. There is no distinction between interlocutory and/or final decision in election matters. Decision under section 164 of the electoral act, 2006 is interpreted thus:-

G *"Decision, means in relation to court or tribunal, any determination of that court or tribunal and includes a judgment, decree, conviction, sentence, order or recommendation."*

See also Awuse v. Odili (2003) 1 8 N WLR (Pt. 85 1) 116 at 157.

H ***It is also pertinent to state that a decision made by a trial court on wrongful admission of evidence or wrongful rejection of evidence is part of the substantive or main trial and not an interlocutory decision. A party wishing to appeal against the judgment of the trial court can file one of the grounds of***

appeal alleging that inadmissible evidence had been admitted during trial or admissible evidence had been rejected. See Okobia v. Ajanya (1998) 6 NWLR (Pt. 554) 348 at 360; First Bank of Nigeria Plc v. Tsokwa (supra) at page 223)

In sum, the objection to the said six grounds of appeal fails. Grounds 1, 2, 4, 5, 6, 7, 11, 13, 19 and 21 of the grounds of appeal in this appeal complain of misdirection in law. The learned senior counsel for the objectors, the 1st and 2nd respondents contends that none of those grounds constitutes a complaint of misdirection. He argued that grounds 1, 6, 7, 12 and 19 of the grounds of appeal did not quote the passages of the judgment where the alleged misdirections occurred and concluded that that inadvertence is fatal. He submitted that a misdirection consists of a direction wrongly given by a Judge to himself which led him to a wrong conclusion occasioning a miscarriage of justice. He contended that an allegation of a misdirection must identify not only the portion of the judgment where the misdirection occurred but also furnish the particulars that render the direction a wrong direction and called in aid the case of Adeniji v. Disu (1958) 3FSC 104, (1968) SCNLR 408 where the Supreme Court said:-

“A ground of appeal alleging misdirection should always, in addition to quoting the passage where the misdirection is alleged to have occurred, specify the nature of the misdirection alleged.”

He went on to submit that in that case, the ground alleging the perceived misdirection without more was held to be incompetent and struck out. He equally referred to the case of Sosanya v. Onadeko (supra) that where a ground of appeal alleges a misdirection, the particulars of such misdirection must not be vague but lucidly given. In Okorie v. Udom (1960) 5 FSC 162, (1960) SCNLR 326 and Anadi v. Okoli (1977) 7 SC 57 at 63 any ground of appeal which fails to meet the required standard stipulated in Order 6 rule 2(2) and rule 3 of the Court of Appeal Rules, 2007 is liable to be struck out. He argued that an examination of grounds 1, 2, 4, 5, 6, 7, 11, 13, 19 and 21 of the grounds of appeal showed that they bear no particulars or the nature of the complaint of misdirection in law which is alleged and submitted that the said ten grounds are incompetent and should be struck out and cited in support of the case of Adeleke v. Asani (2002) 4 S.C. (Pt. II) 125 at 138; (2002) 8 NWLR (Pt. 768) 26.

The learned senior counsel referred to issues Nos. (i), (ii), (iii), (v) and (vii) which were formulated from grounds 1, 2, 4, 5, 6, 7, 11, 12, 13, 19 and 21 of the grounds of appeal and submitted that having been distilled from those incompetent grounds, they are themselves incompetent and should be struck out.

B In response to the foregoing submissions of the learned senior counsel of the 1st and 2nd respondents, the learned senior counsel for the 1st and 2nd appellants submitted that the objection raised by the 1st and 2nd respondents is without substance as there is none of
C the grounds of appeal in support of which sufficient particulars have not been supplied. Aside this, the learned senior counsel contended that the particulars in support of each of the grounds of appeal clearly explain the misdirection in law that is being alleged by the appellants. He argued that the learned senior counsel for the 1st and 2nd re-
D spondents failed to demonstrate to what extent the said grounds of appeal do not comply with the rules of this court.

***I have painstakingly perused the seemingly vexed ten grounds of appeal alleged by the 1st and 2nd respondents to be incompetent for want of particulars from which the
E misdirections in law emanated. I found that each of those grounds provided relevant particulars which are headed in common legal parlance as “particulars of errors” as in grounds 4, 7, 11 and 21. Whereas in grounds 1, 2, 5, 6, 13 and 19, the uncommon heading like “WHEN” was used .***
F

***I do not think the variant way of portraying particulars of error required by Order 6 rule 2(1)(2) and (3) of the Court of Appeal Rules, 2007 has done any violence to the intend-
G ment of the provisions of the Court of Appeal Rules cited (ante). I hold the view that the heading styled “When” instead of particulars of errors” in drafting particulars under grounds of appeal is a slant which serves the same purpose as the phrase “particulars of errors” . See the case of Stephens Industries Ltd. & Anor. v. B. C. C. I. (Nig.) Ltd. (1999) 11 NWLR (Pt. 625)
H 29 at 34 and 35 in which ground 1 and 2 are worded thus:-***

“1. The learned trial Judge erred in law and on the facts in holding that the account of the 1st plaintiff with the 1st appellant had not been at the time material to this action, in part: WHEN:

(i) There was evidence before him by Chief Warmate who

was referred to in paragraph 10 of the statement of claim that the 2nd plaintiff demanded the immediate closure of the 1st plaintiff's account.

(ii) Exhibit D which the learned trial Judge held was 'not dated August 9, 1984...

2. The learned trial Judge erred in law and on the facts in holding that July 30, 1984 appearing on exhibit A which is a specifically crossed cheque is the date material to the action and August 9, 1984 which was the date which exhibit A came through the clearing house to the 1st appellant."

This case has been referred to with particular regard to the purpose of particulars of errors in a ground of appeal and not the propriety of the ground styled as "error" in law and on the facts. Uwaifo, JSC said:-

"I note that ground 1 was not objected to by these appellants. D Ground 2 was objected to on the ground that it contained no particulars. But that ground as held by the lower Court quite rightly, in my view, has particulars incorporated in it "

It must be said that the framing of a ground of error in law or misdirection requiring that particulars be supplied may well be a question of skill of the counsel who raises the ground of appeal. The particulars supporting the grounds need not always be adumbrated. They can often be conveniently laced with or embedded in the complaint made in the ground of appeal to show the reason for such a complaint which makes the ground somewhat self-explanatory. That is the ultimate purpose of requiring particulars. They tend to highlight briefly when and how the error of law occurred. ...

If the reasons are many, there could be need to set them out. Whichever form they are given, they are the particulars envisaged in Order 8 rule 2(2) of the Supreme Court rules (Order 6 rule 2(2) of the Court of Appeal rules 2007. "

See also Atuyeye v. Ashamu (1987) 18 NSCC (part 1) 117 at 130; (1987) 1 NWLR (part 49) 267 Globe Fishing Industries Ltd. v. Coker (1990) 7 NWLR (Pt. 162) 265 at 300; Shyllon v. Asein (1994) 6 NWLR (Pt. 353) 670 at 685.

It is equally of moment to rely on the case of Aderounmu v. Olowu (2000) 4 NWLR (Pt. 652) 253 at 265 - 266 where Ayoola, J.S.C. held as follows;-

“In my opinion, what is important in a ground of appeal and the test the court should apply is whether or not the impugned ground shows clearly what is complained of as error in law and what is complained of as misdirection, or, as the case may be, error of fact. The view with which I am inclined to agree is expressed in the Court of Appeal case of Nteogwuja & Ors. v. Ikuru & Ors. (1998) 10 NWLR (Pt. 569) 267 at 310 that the mere fact that a ground of appeal is framed as an error and a misdirection does not make it incompetent. In my view, only general propositions can be made in a matter in which the question is not as to form A proposition widely stated that a ground alleging an error and misdirection is not incompetent is as objectionable as proposition that every such ground is incompetent. What makes a ground incompetent is not whether it is framed as an error and a misdirection but whether by so stating it, the other side is left in doubt and without adequate information as to what the complaint of the appellant actually is”

In view of the foregoing, the learned senior counsel for the 1st and 2nd appellants urged the court to dismiss the objection.

I have carefully considered the submissions of the learned senior counsel for the 1st and 2nd appellants and the 1st and 2nd respondents and I agree entirely with the impeccable submissions of the learned senior counsel for the 1st and 2nd appellants. The objection to grounds 2, 4, 5, 6, 7, 11, 13, 19 and 21 with the issues raised therefrom is not sustained. I instead hold that they are competent.

In sum, the variant objections to the entire grounds of appeal in the instant appeal are through and through without merit and they are dismissed seriatim. In effect the preliminary objection fails and the court shall proceed with the hearing of this appeal.

At the hearing of the appeal on the 25th November, 2007 four hundred senior counsel who are Chief Wole Olanipekun, B.C. Ukala, Esq., Prince Lateef O. Fagbemi and Livy Uzoukwu, Esq. and the several learned counsel who they led respectively appeared for the 1st and 2nd appellants, the 1st and 2nd respondents, the 3rd respondent and the 4th to the 2891st respondents. Prince L. O. Fagbemi, SAN and Livy Uzoukwu, SAN who appeared for the 3rd respondent and the 4th to the 2891st respondents respectively separately announced that they did not file any brief of argument on behalf of their clients.

The learned senior counsel for the 1st and 2nd appellants and the 1st and 2nd respondents respectively adopted and relied on the brief of argument dated 21st April, 2008 but deemed properly filed on 22nd April, 2008 as well as the one dated 8th May, 2008. Both learned senior counsel considerably elaborated on their respective briefs of argument as well as the appellants' reply brief and urged the court to allow or disallow the appeal as is appropriate to them. B

A careful study of the briefs of argument before the court showed that the 1st and 2nd appellants' brief of argument contains ten issues while that of the 1st and 2nd respondents contains five issues for the determination of the instant appeal. I found that the ten issues identified by the 1st and 2nd appellants subsume the five issues raised by the 1st and 2nd respondents. In view of the comprehensiveness of the issues identified by the 1st and 2nd appellants for the determination of this appeal, I shall make use of them in such a way to reflect the issues raised by the 1st and 2nd respondents. C D

The issues in point have already been set out in this judgment (supra)

On issue No. 1, the learned senior counsel for the 1st and 2nd appellants referred to page 54 of the record of proceedings which contains inter alia, ground 2 of the ground of appeal under which the petition was brought. The said ground reads: E

"The result/return from the election has not been announce/declared by the appropriate returning officer for that ejection. F

(Italics mine for emphasis)

Learned senior counsel also referred to the sworn testimony/deposition of the PW1 (the 1st petitioner/1st respondent) where he stated clearly that the result of the election in point had not been declared as at the time the petition was filed and referred to page 364 of the record of proceedings which contains the several reliefs sought by the petitioners/respondents. He particularly referred to paragraph 15(i)(iii), (iv) and (v) which reads: G

"15(I)(iii) That the result of the election to the office of Governor and Deputy Governor in that election held on the 14th day of April, 2007 for Abia State can only be declared and announced (at the election) by the appropriate returning officer who in this case is the resident electoral commissioner, Abia State and not Mr. E. E. Enabor. That the result of the governorship general election held on

the 14th day of April, 2007 has not been duly and properly announced. That the announcement of the 7th and 2nd respondents by Mr. E. E. Enabor as the persons elected in that general election to the office of Governor and Deputy Governor of Abia State be set aside.” (Italics mine for emphasis)

B The learned senior counsel further referred to section 141 of the Electoral Act, 2006 which provides:

“An election petition under this Act shall be presented within 30 days from the date the result of the election is declared.”

C He went on to submit that there is no gainsaying the fact that, by virtue of section 141 of the Electoral Act, 2006 (supra), declaration of the result of any election is a condition precedent to the filling of a petition by any aggrieved person and that by extension the right of a petitioner to present a petition crystallises after the declaration of
D the result. In effect, a cause of action only accrues in favour of a petitioner after the declaration of the result of the election. He submitted that the foregoing are trite and immutable deductions flowing directly from S.141 of the Electoral Act, 2006.

The learned senior counsel for the 1st and 2nd appellants dwelt
E at great length on the importance placed on condition precedent and called in aid the case of *Madukolu v. Nkemdilim* (1962) 1 All NLR (Pt. 2) 587 at 595; (1962) 2 SCNLR 341 where it was held, inter alia, that a court is competent when a case comes before it
F when it is initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. He exemplified this important condition by citing the case of *Katsina Local Authority v. Makudawa* (1971) NMLR 100 where it was held by Coker, JSC at pages 105-106 thus:

G *“We are clearly of the view that S. 116(2) of the Local Authority Law prescribes a condition precedent to the competence of any action commenced against a Local Authority and that compliance with the subsection is a pre-condition of such competence. The subsection requires such notice as it is therein prescribed to be served on
H the local authority and stipulates that at least one month shall expire before the suit can be legally commenced. It follows therefore, in our view that where it is established that no such notice was served or that the subsection is not otherwise complied with, any suit commenced in contravention of the provisions of the subsection is wrongly*

commenced and should not be entertained by any court.”

In further support of the claim that the 1st and 2nd petitioners/respondents pleaded that the result of the election in point had not been declared by the appropriate returning officer, the learned senior counsel for the 1st and 2nd appellants referred to paragraph 6(1), (b) and (c) of the petition where the petitioners/respondents B averred thus:

“(a) At the close of voting on the day of the election and before the final completion of collation, Mr. E.E. Enabor who has been joined as a respondent in this petition purported to have announced on Sunday 15th April, 2007 that the candidate of PPA, Chief T.A. Orji is returned as the elected Governor of Abia State in that election. If his said announced result were valid then the result of the election was declared/announced on 15th April, 2007.” C

(b) The said Mr. E.E. Enabor was never the appropriate returning officer for the Governorship election of 14th April, 2007 held in Abia State. He is the Head of Department of Legal/Public Affairs, INEC, Abia State. Oral and documentary evidence shall be led at the trial in support of this fact. The petitioners shall contend at the trial that the declaration of result made by Mr. Enabor is void. D E

(c) The appropriate returning officer for that election is the Resident Electoral Commissioner, Abia State at the material time was Mr. Solomon Soyebi and he did not announce the result of that Governorship election held in Abia State on the 14th day of April, 2007. He never signed any certificate of return referable to that election. The certificate of return dated 15th April, 2007 and purportedly signed by Mr. Solomon Soyebi and more particularly the copy thereof issued to the police and agents of the political parties is hereby pleaded. Notice is given to INEC to produce the counter part copy kept by INEC.” F G

Based on the aspects of the pleadings in the petition reproduced so far, the learned senior counsel for the 1st and 2nd appellants submitted that the facts that have so far emerged are

- (i) Election results had not been announced; H
- (ii) No cause of action had arisen at the time of filing this petition.

Learned senior counsel for the 1st and 2nd appellants submitted that in election matters it is imperative that the election result had

been declared as at the time the petition was filed because if no such result is available no winner will be announced and/or emerge for the loser or losers to ventilate their grievances. Non-declaration of results will be contrary to the intendment of paragraph 4 (l) (c) of the First Schedule to the Electoral Act, 2006. He contended that since
 B the petitioners/1st and 2nd respondents have averred explicitly in their joint petition that the results of the election had not been announced whether at all or by the officer who under section 28 (2) (g) of the electoral act, 2006 is designated to do so, it still means that no
 C cause of action had accrued to the petitioners/1st and 2nd respondents to file a petition challenging the election of the appellants. He relied on the case of Thomas v. Olufosoye (1986) 1 NWLR (Pt. 18) 669 at 671 wherein the “cause of action” was defined to:

“comprise every fact (although not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court.”

He also referred to the case of Afolayan v. Ogunrinde (1990) 1 NWLR (Pt. 127) 369 at 371 in which cause of action is defined as:

*“(a) a cause of complaints;
 E (b) a civil right or obligation for determination by a court of law;*

(c) a dispute in respect of which a court of law is entitled to invoke its judicial powers to determine.”

and the definition was furthered thus:

“It is a factual situation which enables one person to obtain a remedy from another court with respect to injury.”

The learned senior counsel in underscoring the essence of a complaint in an election referred to the case of *Mudiaga Erhuev. I.N.E.C.* (1999) 12 NWLR (Pt. 630) 288 where it was, in part, at
 G p.299 held:

*“...that since there is no election complained about in this appeal the appellant failed through and thorough to present a petition for which the trial tribunal could assume jurisdiction. I am therefore
 H in total agreement with the trial tribunal which used its discretion as provided in sub-paragraph (b) above judiciously to strike out the petition for non-compliance with the provisions on what an election petition should contain. In effect, what the appellant presented to the trial tribunal sitting in Asaba was a petition devoid of election petition*

flavour.”

Equally pertinent to the issue of whether or not a cause of action has arisen in any election matter *vis-a-vis* the declaration of election results, it was held, *inter alia*, in the case of Otu v. INEC (1999) 5 NWLR (Pt. 602) 250 at 256 thus:

“The tribunal also held rightly in my view that it was true, as contended by the petitioner that there was no declaration of a winner on the date of the election, it would mean that no cause of action had arisen before the petitioner filed his petition, meaning that the petition was incompetent and should be struck out for disclosing no cause of action. In other words, this is a case of tail you loose, head you loose and I agree with them.”

The learned senior counsel also relied on the Supreme Court case of Atolagbe v. Awuni (1997) 9 NWLR (Pt. 522) 536 at 608 on the definition of condition and held:

“A provision which makes the existence of a right dependent on the happening of an event, the right is then conditional as opposed to absolute right. A true condition is where the event on which the existence of the right depends is certain A condition precedent is one which delays the vesting of a right until the happening of an event.”

The learned senior counsel submitted that it is the plaintiff’s claim/action that vests jurisdiction in a court and cited in aid the case of Adeyemi v. Opeyori (1976) 9-10 SC 31; Mustapha v. Governor of Lagos State (1987) 2 NWLR (Pt. 58) 539.

He submitted that since the petitioners/1st and 2nd respondents claim in the instant petition have divested the lower tribunal of jurisdiction, the entire proceedings before the trial tribunal constituted a nullity and as an election matter which is *sui generis*, the proper order to make is not just striking out the petition but the order should be that of dismissal. He relied on the case of Ibrahim v. I.N.E.C. (1999) 8 NWLR (Pt. 614) 334 at 352-353 where it was held:

“A petition found incompetent for want of justiciable ground merely striking it out will create wrong impression that the petitioner could fish for grounds, however, tenuous to come back.”

In response to issue No. 1, the learned counsel for the 1st and 2nd respondents submitted that an election petition is one whole

document which should be construed wholistically and he relied on the case of *Awuse v. Odili* (2004) 8 NWLR (Pt. 876) 481 at 513 and particularly the case of *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 at 142 in which it was held

B *“In dealing with pleadings, a court must read all the paragraphs together to get the case of the parties because it is the totality of the pleadings whether it is the statement of claim or the plaintiff’s action that state the case of the party and it will be unjust to invoke a few paragraphs of either pleadings to come to a conclusion.”*

C Learned senior counsel for the 1st and 2nd respondents, apparently by way of digression on the issue of the competence of the petition filed by the 1st and 2nd petitioners/1st and 2nd respondents, with due regard, went on to deal with pleaded scores of the parties and the announcement wrongly made by Mr. E.E. Enabor. He argued that the fact that the announcement was not made by the appropriate returning officer did not make the petition invalid but that obligation relates to the issue of the conduct of the election being an issue which requires proof. He went further to refer to S. 32(4) of the Electoral Act, 2006 and further argued that the provision therein
E merely permit a person to sue if he has reasonable grounds to believe that any information given by a candidate in the affidavit is false. He went on to contend that the 1st and 2nd respondents/1st and 2nd appellants have failed to put in any affidavit in issue. I shall
F cursorily remark that this line of argument is not, I dare say relevant to whether or not the petition filed by the 1st and 2nd respondents is competent or not competent. The learned senior counsel for the respondents continued that line of argument at considerable length. He eventually, at page 33 of the 1st and 2nd respondents’ brief of
G argument, urged that issue no. I be resolved accordingly and in particular to hold that the petition is competent and that the election tribunal was competent to inquire into the allegations of non-qualification or disqualification of the 1st and 2nd respondents/appellants. It should be pointed out that although some of the factors set out in
H paragraph 4(1) of the First Schedule to the Electoral Act are present, the absence of non declaration of results at that election is fatal as all the conditions are not met.

In retrospect, the only aspect that calls for determination in issue No. 1 is whether or not the petition filed by the 1st and 2nd

respondents is competent. In an election matter it is the duty of a candidate who is dissatisfied with the outcome of the election that the wrong candidate has been returned or declared the winner to file a petition to vent his grievance and seek redress in a legally constituted tribunal or court set up in accordance with S. 285(1) of the 1999 Constitution. Paragraph 4 of the First Schedule to the Electoral Act, 2006 has lucidly specified what are the contents of a competent petition. The paragraph reads:

“4(1) An election petition under this Act shall -

(a) specify the parties interested in the election petition ;

(b) specify the right of the petitioner to present the election petition;

(c) state the holding of the election, the scores of the candidates and the person returned as the winner of the election; and

(d) state clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner.” (Italics mine for emphasis)

Equally related to the pre conditions for a valid petition as stated above is S. 28 (2) (g) of the Electoral Act, 2006 which reads;

“28(2) Results of all the elections shall be announced by:

(g) the Resident Electoral Commissioner who shall be the returning officer at the Governorship election; and ...”

The combined reading and application of the foregoing two provisions which operate cumulatively portrays what a valid petition should contain and they serve as conditions precedent. Those procedural steps are in effect a sine qua non for a valid petition. It is now very well settled that an election petition is heard and determined by an appropriate election tribunal. The jurisdiction of an election tribunal is of a special nature such that a slight default in complying with the procedural steps which otherwise could be cured or waived in other proceedings could result in fatal consequences for the petition See Abubakar v. INEC (supra) at page 166: (2004) 1 NWLR (Pt.854) 207; Buhari v. Yusuf (2003) 40 WRN 124; (2003) 14 NWLR (Pt. 841) 446; Mudiaga Erhuev v. INEC (supra). ***It is also pertinent to state that if in a petition the petitioner states that the result of the election has not been announced that such a petition does not contain a cause of action.*** It is equally fatal if such

a petition is not presented within 30 days from the date the result of the petition is declared. See *Otu v. INEC* (supra) at p. 256.

A cause of action has already been defined in the course of his judgment and it is apt to say that if no cause of action has accrued there is no basis in the petition to challenge the candidate returned as
B elected. See *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669 at 671; *S.P.D.C. (Nig.) Ltd. v. X.M. Fed. Ltd.* (supra).

It is of particular moment to state the law that where a cause of action is absent in a suit, the court is divested of jurisdiction to enter-
C tain it. The cause of action which is in nature jurisdictional can be garnered from the petition or pleadings. Once a lower court has no jurisdiction to adjudicate on a matter and even if it had done so, such adjudication would be adjudged a nullity by the appellate court since jurisdiction is a very fundamental issue that robs on the competence
D of the court to hear and determine a matter. It is also the law that where a party submits itself to a court for adjudication of a matter for which it is seeking redress without cause of action, it cannot clothe the court with jurisdiction to hear and determine the matter. In other words, a proceeding that emanated from a court without jurisdiction
E is like one that never took off at all because the court should not have entertained the suit for it is incompetent to do so. See *FK.I.N. v. Gold* (2001) 11 NWLR (Pt. 1044) 1 at 19.

It is at the risk of repetition to state the trite law that it is the petitioner's petition and/or the plaintiff's action that vests jurisdiction in a court and if the petitioner's claim has divested the trial or lower tribunal of jurisdiction, the entire proceedings before the lower tribunal constitute a nullity and as an election matter being sui generic, the proper order to make is not just striking it out but that of dismissal. See *Adeyemi v. Opeyori* (supra) 31; *Mutstapha v. Governor of Lagos State* (supra) 539; *Ibrahim v. IN EC* (supra) at 352 - 353.
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It is apparent from the state of proceedings in the petition before the trial tribunal that the 1st and 2nd petitioners/ 1st and 2nd respondents in their reliefs (iii), (iv) and (v) and paragraph 6 (a), (b) and (c) (already reproduced) where the petitioners did not mince words in alleging that the result of the attendant election of 14th April, 2007 had not been announced by the Resident Electoral Commissioner. In view of
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this clear assertion, albeit self defeatist, the 1st and 2nd petitioners/1st and 2nd respondent, by virtue of the several principles on competence of a petition, it will be foolhardy for this court being an appellate court, to hold that the petition in issue conferred jurisdiction on the trial tribunal.

I am not unmindful of the argument of the teamed senior counsel for the 1st and 2nd respondents first, that in the construction of the instant petition there is need to globally review it. I have reviewed the entire two petitions and observed that the petitioners/respondents in particularly the vital aspects of the petitions, that is to say the reliefs sought, where they emphatically averred that the results of the election have not been announced. That in effect means that the trial tribunal was not vested with jurisdiction because the petitions are devoid of cause of action. Secondly, that the petitioners/1st and 2nd respondents in paragraph 6 (a), (b) and (c) of the petition averred that although there was an announcement that returned the 1st and 2nd respondents/1st and 2nd appellants as the winners of the election in point on 15th April, 2007 by Mr. E.E. Enabor but that that declaration was irregular as he was not the proper officer to do so. It was instead the Resident Electoral Commissioner, Mr. Solomon Soyebi, who is statutorily designated to do so. I am of the strong view that the import of the alleged inadvertence on the part of INEC is that declaration of results was not within the contemplation of paragraph 4(1)(a), (b) and (c) of the First Schedule to the Electoral Act, 2006. The consequence was that there was no declaration of results of the election that took place on 14th April, 2007. In these circumstances and in view of the special nature of election matters petition and/or petitions as the entire proceedings thereon are a nullity. In consequence, I find merit in ground I of the grounds of appeal and issue no. 1 in favour of the 1st and 2nd appellants.

In view of the court's resolution on ground No. 1 that the petitions are incompetent and dismissed, it will amount to futile exercise considering the remaining nine issues raised for the consideration and determination of this appeal. It is, however, very settled that this court being an appellate court has a duty to consider all the issues raised before it. See *7Up Bottling Co. & Ors. v. Abiola & Sons Bottling Co. Ltd.* (2001) 13 NWLR (Pt. 730) 469 at 493, 494, 514 and 516. It is more so because issue no. 1 has not adequately covered the

issues of resignation of the 1st and 2nd appellant, secret society and consideration of petitions to mention but a few. I shall therefore consider the remaining issues raised for the determination of the instant appeal.

On issue Nos. 2 and 3 of the grounds of appeal raised from grounds 2, 3, 4, 5, 6, 7, 8 and 9, the learned senior counsel for the 1st and 2nd appellants submitted that these two issues involve the constitutional interpretation Ss. 182 (l) (g) and 318 (i) of the 1999 constitution as well as the consideration of pleadings and evidence. He argued that it is in the pleadings of the petitioners/1st and 2nd respondents/1st and 2nd appellants were still in the public service of Abia State and that they failed to resign 30 days before the election and that they also failed to state what offices each of the appellants held. Other allegations made against the 1st and 2nd appellants by the 1st and 2nd respondents in the petition are the purported misuse by the 1st appellant and the Governor of Abia State of the office of Chief of staff to the governor to embezzle N500 billion. He also highlighted the fact that it was at the address stage that the learned senior counsel for the 1st and 2nd respondents submitted that the 1st and 2nd appellants were the chief of staff to the Governor of Abia State and Commissioner for Lands respectively. He reproduced the provisions of S. 182(i) (g) of the 1999 Constitution and said that the operative words therein are

“being a person employed in the public service of the Federation or of any State.”

And argued that there must be proof or evidence of employment of the person which the said section forbids from contesting to give notice of resignation 30 days before election. He further argued that the word “employed” envisages an employer, an employee and an employment in itself and also with the connotation of master and servant relationship. He contended that it is only when these conditions are present that a resignation of an employee from the service of the employer is anticipated or expected. He referred to section 318(i) of the 1999 Constitution on the interpretation of “public service of a State” in its categorizations in (a), (b), (c), (d), (e), (f), (g) setting out persons or staff who are in the public service of a State and that under none of those categorizations does a Chief of Staff to a Governor or Commissioner for a State feature. He submitted that

in the 1999 Constitution having narrowed down those who are in the public service of a state, the categorization cannot be increased or expanded by any party or court. He further submitted that in the interpretation of a statute or the constitution, it is a cardinal principle that specific mention of one specie of a thing means the exclusion of others and/or that the several others would not include the specifics as encapsulated in the Latin maxim “*generalia specialibus non derogant*”. He argued that the interpretation given to S. 182 (l) (g) of the 1999 Constitution by the trial tribunal corrupted the clear provisions of that section and submitted that any interpretation corrupting the text of the constitution or statute would not be allowed to stand as the words in the constitution or in a statute must be construed as they stand and not as anybody thinks and cited in support the case of *Nwangwu v. Nzekwu* (1957) 2 FSC 36; (1957) SCNLR 61; *Lion Insurance Asso. Ltd. v. Tucker* (1883) 12 QBD 176.

He also relied on the Supreme Court case of *Ehuwa v. O.S.I.E.C.* (2006) 18 NWLR (Pt. 1012) 544 at 568-569 where it was held:

“It is now firmly established that in the construction of a statutory provision where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included. The Latin maxim is “Expressio unius est exclusio alterius” i.e. the expression of one thing is the exclusion of another. It is also termed “Inclusio unius est exclusio alterius” or “Enumeratio unius est exclusio.”

Learned counsel specifically referred to the case of *Dada v. Adeyeye* (2005) 6 NWLR (Pt. 920) 1 at 19-20 where this court considering the provisions of section 182(l)(g) read together with S. 318 of the 1999 Constitution held that from the definition in S.318 of the 1999 Constitution the Governor of a State, his Deputy, the Speaker and all other political office holders are not in the public service of a State.

Learned senior counsel submitted that the law is trite that parties are bound by their pleadings and that issues are tried on the parties’ pleadings and the parties are bound thereby and cited in aid the cases of *George & 2 Ors. v. Dominion Flour Mills Ltd.* (1963) 1 ANLR 71; (1963) 1 SCNLR 117; *N.I.P.C. v. Thomson Kraus Org. Ltd.* (1969) NMLR 99; *Emegokwue v. Okadigbo* (1973) 4 SC 113;

Akrapuna v. Nzeka II (1983) 2 SCNLR 1. He contended that in the pleadings of the petitioners/1st and 2nd respondents the following salient, crucial and mandatory fact, among others, were not pleaded:

- (1) The specific offices which the appellants occupied in the public service of Abia State.
- B (2) Whether or not they are pensionable employees;
- (3) Letters of their appointments stipulating that they must give 3 months notice before resigning like employees in the public service who must give 3 months notice which the Constitution only enacted concerning them.
- C (4) The time and date the appellants resumed offices.
- (5) The conditions of service of the appellants.

The learned senior counsel for the 1st and 2nd appellants having submitted that it is clear that the Governor of a State, the Deputy D Governor, the Speaker, the Commissioners and all other political office holders are not in the public service of a state within the meaning of S.318 (1) of the 1999 constitution, he, however, conceded that under Part II of the Fifth Schedule to the 1999 Constitution, the president of the Federation, the Vice President of the Federation, E Governors and Deputy Governors of States, Commissioners of the Government of a State, among several others, are public officers, for the purpose of the code of conduct.

As regards resignation of the 1st and 2nd appellants, the learned senior counsel for the appellants, contended that aside that issue, the F 1st and 2nd respondents made several bare assertions particularly through the PW1 (the respondent), without proving them. This is because of the obvious fact which the trial tribunal characterized as hearsay. Quite regrettably, however, the self same tribunal turned G round to believe the evidence of the PW1 as having established such allegations as non resignation, receiving salaries, making use of government quarters and vehicles as well as the 1st appellant's membership of Okija secret society. He argued that the burden of proof to establish all the assertions in the petitions by virtue of S. 137 of the H Evidence Act is on the respondents. It is part of the burden of proof that the petitioners/1st and 2nd petitioners should tender the pay slips of the appellants, the bank statements where salaries were paid, description of the official quarter occupied by the appellants. He submitted that the petitioners failed woefully to discharge the burden

statutorily placed on them. He further submitted that with the earlier faultless finding of the tribunal that the evidence of the PW1 who testified on the several allegations against the appellants is replete with hearsay evidence, the tribunal should have automatically come to the conclusion that the complaints and/or allegations made against the appellants are non issue or without basis as no probative value should be attached to both the sworn submissions and documentary evidence. B

In response to issue No. 2, the learned senior counsel for the 1st and 2nd respondents adopted the arguments proffered in support of the preliminary objection which the court has held that it is devoid of merit. He submitted on the issue of the appellants being employed in the public service of Abia State was not denied by them and argued that it is too late in the day for the appellants to argue that they were not in the employment of the public service of Abia State. The learned senior counsel for the 1st and 2nd respondents contended that by virtue of S. 318 of the 1999 Constitution, the appellants were persons employed within the public service of Abia State. C D

The aspect, of moment in the instant issues No. 2 and 3 are first, the several allegations of the failure of the 1st and 2nd appellants not resigning within 30 days before the election and secondly whether they were employed in the public serviced of Abia State. E

First, the 1st and 2nd respondents made such serious allegations as collecting salaries, living in and using government of Abia State facilities within 30 days before the election which took place on 14th April, 2007 without adducing pungent evidence to back up such allegations. All that happened were bare assertions by the star witness, the PW1. The question is how reliable is the evidence of the PW1. I am of the view that from the state of the record of appeal that his testimony which the trial Tribunal found to be replete with hearsay cannot attract any probative value. In effect his testimony consisting oral and documentary evidence which emanated from parties not called to substantiate the items passed on to him (the PW1 are to say the least are not cognizable as legal evidence from which any truth would emerge. I agree with the trial tribunal that the evidence of the PW 1 on which the judg- F G H

ment of the trial tribunal was based is hearsay. The trite position in law is that hearsay evidence has no probative value. The consequence thereby is to discountenance it and where it has been made used of by the court, it should be regarded as inadmissible evidence and expunged. It is accordingly expunged.

B The 1st and 2nd respondents, therefore in these circumstances, failed to prove what they asserted against the 1st and 2nd appellants as enjoined by S. 137(1) of the Evidence Act which reads:

C “137(1) In civil cases, the burden of first proving the existence or non existence of a fact lies on the party against whom the judgment of the court would be given if no evidence was produced on either side, regard being had to any presumption that may arise on the pleadings.”

D In the instant case, the 1st and 2nd respondents failed woefully to establish the several allegations made against the 1st and 2nd appellants because the evidence adduced without the evidence of the PW. 1 is bare because they failed to establish the facts to sustain them.

E Secondly, the next issue is whether or not the 1st and 2nd appellant were employees in the public service of Abia State at the time of the election to warrant their resigning at least 30 days to the date of the election. In order to satisfactorily deal with this issue, it is apt to consider Ss. 182 (g) and 318(1) of the 1999 Constitution. The two sections read:

F “182(1) No person shall be qualified for election to the office of Governor of a State if

(g) being a person employed in the public service of the federation or of any state, he has not resigned, withdrawn or retired from the employment at least thirty days to the date of the election; or...”

Section 318 of the 1999 Constitution which is on interpretation states:

H “public service of a State means the service of the State in any capacity in respect of the government of the state and includes service as -

(a) Clerk or other staff of the House of Assembly;

(b) member of staff of the High Court, the Sharia Court of Appeal, the Customary Court of Appeal or other Courts established for a State by this Constitution or by a law of a House of Assembly;

(c) member or staff of any Commission or authority established for the State by this Constitution or by a law of a House of Assembly;

(d) staff of any local government council;

(e) staff of any statutory corporation established by a law of a House of Assembly;

(f) staff of any educational institution established or finance principally by a government of a State; and

(g) staff of any company or enterprises in which the government of a state or its agency holds controlling shares or interest.”

This court is replete with authorities on the interpretation of the provisions of S. 182(g) already reproduced (above) on who a person employed in the public service of a State is. It is however, vital that whoever is alleging that a person is in the service of particularly a state as in the instant case must establish by proven evidence of employment of the persons who S. 182(g) above forbids from contesting or mandates to give a notice of resignation of 30 days before the election that took place on 14th April, 2007. The learned senior counsel for the 1st and 2nd appellants went to say that the persons contemplated are set out in paragraph (g) of S.182 of the 1999 constitution. I entirely agree with him on that score as well as his further submission that it is only when the person is successfully challenged as an employee in the public service of a State or service of the Federation that he is expected to give notice of his resignation from that office within 30 days before election. **The 1999 Constitution has apparently gone a further step by making itself explicit in the interpretation or explanation of what it meant by public service of the federation of a state in its S. 318(1) in its categorization of the term under sub paragraphs (a), (b), (c), (d), (e) and (f) already reproduced above and that under none of these categorization does a chief of staff to a Governor or Commissioner for a State fall. It should be observed that the petitioners did not specify the particular offices held by the 1st and 2nd respondents in their petitions. This was, however, unveiled when the 1st and 2nd respondents averred in their reply and address that they were Chief of Staff to the erstwhile Governor of Abia State and a past Commissioner in that Government. This disclosure is acceptable and the tribunal could make**

use of it instead of holding on to the rigid technicality that the disclosure was not pleaded.

As far as S.318 (1) is concerned, the 1999 Constitution has specifically set out the categories of staff within its contemplation. The law is settled that in the interpretation of the constitution or a statute, specific mention of names or items means the exclusion of others not mentioned and/or that the several items will not include the specific items. This principle of interpretation is encapsulated in the Latin maxim of “*generalia specialibus non derogant*.” Equally relevant is the Latin maxims of “*expressio unius est exclusio alterius*”, “*inclusio unius est exclusio alterius*” and “*enumeratio unius est exclusio alterius*” meaning in essence the express inclusion of one thing is the exclusion of another. The golden rule of interpretation is that words of a statute must prima facie be given their ordinary meaning. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of constitutional provisions or statutory words. See *Nwangwu v. Nzekwe* (supra) at page 36, *Lion Insurance v. Tucker* (supra) *Aqua Ltd. v. Ondo State Sports Council* (supra) at page 622; *Notes v. Donaster Amalgamated Collieries Ltd.* (1940) A.C. 1014 at 1022.

I am bound by the foregoing principles and on the total evaluation of the facts available on record, I shall differ from the finding of the trial tribunal and hold that both the 1st and 2nd respondents/1st and 2nd appellants were not specifically mentioned or within the contemplation of section 318(1) above and not being employees in the public service of Abia State are not bound by Abia State public service rules. In effect, the 1st and 2nd appellants are not in duty bound to give 30 days notice or one month’s notice as wrongly averred by the petitioners in paragraph 6 (p) of the petition or any notice at all.

Equally relevant to fortify my view that the 1st and 2nd appellant are not public officers as defined by S. 318(1) of the 1999 constitution are sections 192(1), 193(1) and 208(1), 2(a)(b)(c)(d) and (5) of the same Constitution. They read in that order as follows.

“192(1) There shall be such offices of Commissioners of the government of a State as may be established by the Governor of the State.”

“193. The Governor of a State may, in his discretion, assign to

the Deputy Governor or any Commissioner of the government of the state responsibility for any business of the government of that State, including the administration any department of government.”

“208(1) Power to appoint persons to hold or act in the offices to which this section applies and to remove persons so appointed from any such office shall vest in the Governor of the State. B

(2) The offices to which this section applies, are namely -

(a) Secretary to the government of the State;

(b) Head of the Civil Service of the State;

(c) Permanent Secretary or other Chief Executive in any Ministry or Department of the government of the State howsoever designated; and C

(d) Any office on the personal staff of the Governor.

(5) Any appointment made pursuant to paragraphs (a) and (d) of subsection (2) this section shall be at the pleasure of the Governor and shall cease when the governor ceases to hold office. D

Provided that where a person has been appointed from a public service of the Federation or a State, he shall be entitled to return to the public service of the federation or of the state when the governor ceases to hold office.” E

It is apparent from the wording of the foregoing provisions that the offices of the Chief of Staff being the head of the personal staff of the governor and the commissioner of the state being offices respectively held in the erstwhile government of Abia State by 1st and 2nd appellants are political office holders whose appointees among others, serve at the pleasure of the Governor of Abia State and accordingly not persons in the public service of Abia State. A judicial pronouncement was succinctly made in the case of Dada v. Adeyeye (2005) 6 NWLR (Pt. 920) I at 19 - 20: while considering the provisions of section 182(l)(g) read together with S. 318(1) of the 1999 constitution that the Governor of a State, his Deputy, the Speaker and all other political office holders are not in the public service of the State. This court expatiated that from the above definition, it is clear that the governor of a State is not in the public service of that State within the meaning of S. 318(l) (supra). See also the case of Asogwa v. Chukwu (2003) 4 NWLR (Pt. 811) 540 at 546 where it was held, inter alia, that the interpretations in the two sections above are saying the same thing that is to say that the term F

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public officer should only relate to the holder of the offices as reflected in S. 318, supra, being employees whose appointments enjoy statutory flavour because it is only those set of people who have conditions of service and/or letters of appointment stipulating how many years they are to spend in service, at what age they should retire, the number of months to be given a notice either by the employer to mention a few conditions of service. See also Governor, Ebonyi State v. Isuama (2004) 6 NWLR (Pt. 870) 511 at 528; Ojukwu v Yar'Adua (2008) 4 NWLR (Pt. 1078) 435 where this court held that Governors of a State and by extension the Chief of Staff to the Governors and Commissioners appointed by them (the Governor) are not public officers who should resign their positions before contesting in an election.

In sum, I find merit in grounds 2, 3, 4, 5, 6, 7, 8 and 9 of the grounds of appeal from which issues No. 2 and 3 were raised. I accordingly resolve Nos. 2 and 3 in favour of the 1st and 2nd appellants.

The learned senior counsel for the 1st and 2nd appellants argued issues Nos. 4 and 5 together because they touch on and relate to membership of a secret society. He submitted that in order to appreciate the meaning of “member of any secret society”, it will be instructive to read S. 182(l)(h) together with S. 318(1) of the 1999 Constitution.

Section 182(l)(h) above reads:

“182(1) No person shall be qualified for election to the office of Governor of a State if :

(h) he is a member of any secret society or Section 318(1) of the 1999 Constitution defines secret society as:

“secret society includes any society, association, group or body of persons (whether registered or not)

(a) that uses secret signs, oaths, rites or symbols and which is formed to promote a cause, the purpose or part of the purpose of which is to foster the interest of its members and to aid one another under any circumstances without due regard to merit, fair play or justice, to the detriment of the legitimate interest of those who are not members;

(b) the membership of which is incompatible with the function or dignity of any public office under this Constitution and whose

members are sworn to observe oath, of secrecy; or

(c) the activities of which are not known to the public at large, the names of whose members are kept secret and whose meetings and other activities are held in secret. ”

The learned senior counsel for the 1st and 2nd appellants as a preamble submit that the 1999 Constitution leaves no one in doubt as to its definition and perception of a secret society and that since the said Constitution has made specific provisions thereat, no one not even the National Assembly can add or subtract from it. See A.-C., Abia State v. A.-C., Federation (2005) 12 NWLR (Pt. 940) 452 at 553.

Both learned senior counsel for the 1st and 2nd appellants and the 1st and 2nd respondents made submissions on issues Nos. 4 and 5. I found that the learned senior counsel for the 1st and 2nd respondents relied on the evidence of the PW1 (the 1st respondent) and the PW5 (Mr. Isaac Olisabueze Okolie) to establish that the 1st appellant was a member of Okija secret society. The trial tribunal agreed with the evidence of the PW1 and the PW5, among others and held that the 1st appellant was a member of a secret society known as Okija or Ogwugwu Akpu secret shrine.

From the state of the record of proceedings, I observed that the PW1 in essence made a bare assertion that the 1st appellant was a member of Okija secret society without more. This is so because his items of evidence were adjudged by the trial tribunal as hearsay. It is trite that hearsay evidence is devoid of probative value and, in the instant case, cannot sustain the allegation that the 1st appellant was a member of the Okija/Ogwugwu shrine alleged to be a secret society by the 1st and 2nd respondents. Equally unhelpful to the case of the 1st and 2nd respondents is the evidence of the PW5 who testified that the appellant was a member of the Okija shrine said that he was the registrar or secretary of the said society also known as Ogwugwu secret society. He (the PW5) backed up his assertion by identifying a video clip (exhibit HS) which showed the alleged initiation of the 1st appellant into the Okija secret society. There is, however, available evidence that the PW5 was not the maker of exhibit HS. It was instead one Dr. Duru who apparently did not testify at all. Exhibit HS by virtue of S. 91 of the Evidence Act renders such items of evidence inadmissible. Equally unhelpful to the case of the 1st and 2nd

respondents is the entire evidence of the PW5 who was brought into the case in petition No. ABS/GOV/EPT/9/2007 filed after petition No. ABS/GOV/EPT/4/2007 without complying with paragraph 1(1)(a)(b) and (c) of the Practice Directions, 2007. Paragraph 1(1)(a)(b) and (c) of the Practice Directions reads:

- B *“1 (1) All petitions to be presented before the tribunal or court shall be accompanied by; (a) List of all the witnesses that the petitioner intends to call in proof of the petition;*
(b) written statements on oath of the witnesses; and
 C *(c) copies or list of every document to be relied on at the hearing of the petition.*

(2) A petition which fails to comply with sub-paragraph(1) of this paragraph shall not be accepted for filing by the secretary.”

(Italics mine for emphasis)

- D The foregoing provisions have been judicially pronounced upon severally. Thus, in *Okereke v. Yar’adua* (2008) 6 NWLR (Pt. 1082) 37 at 64 it was held:

- “In the instant petition, there was no list of witnesses that the petitioner intends to call in proof of his petition and written statements of witnesses on oath and the copies or list of documents to be relied on for the hearing of the petition as required by the Court Practice Direction, 2007. Though it is my candid view that the petitioner has the locus standi to present the petition by virtue of S. 144(1)(a) of the Electoral Act, 2006, nonetheless, the petition as presently constituted is not only defective but incurably defective and ought not to be allowed. The petition dated and filed on 21st May, 2007 is hereby struck out for being incompetent.”:*

- In the instant case, the petition in point No. ABS/GOV/EPT/9/ 07 was filed by the Peoples Democratic Party on 14th May, 2007 but which was not frontloaded with the inclusion of witness, PW5 (Mr. Isaac Olisabueze Okolie) and the document that is to say the video clip marked exhibit HS. Both the PW5 and exhibit HS were not listed or frontloaded as a witness and the document respectively. They were instead brought in particularly in petition No. ABS/ GOV/EPT/9/07 in the reply of the petitioner/respondent’s to the reply of the 1st and 2nd respondents/1st and 2nd appellants. This approach to start with is utterly irregular and is an affront to paragraph 1(1) (a) (b)***

and (c) above as the petitioner cannot at reply stage be allowed to bring in, without leave for an amendment sought and got from the court, any substantial facts which ought to have been raised in the petition itself. It is unfair and prejudicial for the petitioner/respondent to bring in the PW5 and through him (the PW5) exhibit HS into petition No. ABS/GOV/EPT/9/07 at the petitioner's reply stage being a time when the respondents/appellants could no longer reply to their substantial allegations and far-reaching evidence. See *Obot v. Central Bank of Nigeria* (1993) 10 SCLJ 268 at 284; (1993) 8 NWLR (Pt. 310) 140 where it was held that a reply.

"is not necessary if the only purpose is to deny the allegations in the defence."

Furthermore the proper function of a reply is to raise it in answer to the defence of any matter which may be admissible or where because of the defence filed by the plaintiff proposes to lead evidence in rebuttal. See *Ishola v. S.G. Bank Ltd.* (1997) 2 SCNJ 1 at 16; (1997) 2 NWLR (Pt. 488) 405. See also the case of *Oje v. Babalola* (1991) SCNJ 110; (1991) 4 NWLR (Pt. 185) 267 where it was held that a plaintiff should not raise a new cause of action in the reply and that a reply must not plead facts different from the allegations in the statement of claim where this rule is breached. In the case of *Adepoju v. Awoduyilemi* (1999) 5 NWLR (Pt. 603) 364 at 382-383 it was held that a petitioner cannot introduce new facts not otherwise contained in his petition in his reply because as at the time of filing his petition, those facts were within his knowledge and if he did not adequately put them in his petition, the proper thing to do will be to amend the petition assuming that is possible. The Court of Appeal therefore set aside/struck out the reply and held that the lower tribunal misdirected itself by countenancing it. In the instant case, the paragraphs that brought in the PW5 and exhibit HS were misplaced in the sense that it is an affront to do so at the reply stage. They ought to have, in the spirit of the novel principle of front loading formed part of the list of witnesses and documents to accompany the petition No. ABS/GOV/EPT/9/2007. This, the petitioner failed to do thereby rendering the sworn testimony of the PW5 and exhibit HS (the video clip) admissible and the said averments incurably defective and not ought to be allowed. Having being allowed by the trial tribunal this

court is duty bound to strike them out and they are struck out.

I have sufficiently dealt with the binding principles on filing fresh issues in the petitioner's reply to the respondent's reply particularly when the facts introduced were available at the time the party's petition was filed. The consequence of such approach is to strike out
B the paragraphs in the petitioner's reply as they are offensive.

Apart from the petitioner/respondent irregularly filing the reply brief, the petitioner/respondent in petition No. ABS/GOV/EPT/9/2007 the provisions of paragraph 1(i)(a), (b) and (c) of the First Schedule to the Electoral Act, 2007 which forbid the introduction of the
C PW5 and exhibit HS that is to the sworn testimony of the PW5 and a video clip respectively by virtue of paragraph 14(2) of First Schedule to the Electoral Act is not in order. Despite the obvious flaws in the evidence of the petitioner/respondent brought in by the, PW5 the
D trial tribunal accepted them and held that the petitioners/ the 1st and 2nd respondents had established the allegation that the 1st appellant was a member of Okija secret society. Since the items of evidence of the PW. 5 which include the video clip (exhibit HS) were introduced irregularly, the trial tribunal ought to have expunged them and/or
E struck them out. Since the trial tribunal glaringly failed to do so, this court being an appellate court has the bounding duty to expunge the inadmissible evidence of the PW5 which was improperly admitted by the trial tribunal and decide the case on admissible evidence even
F when no objection is raised by the appellants in the trial tribunal. See Alase v. Olori-Ilu (1964) NMLR 66; Ajayi v. Fisher (1956) SCNLR 279; Agbaje v. Adigun (1993) 1 NWLR (Pt. 269) 261. In view of the foregoing and in keeping with the established principles set out above, I shall in strict compliance with paragraph 1(2) of the Practice Direc-
G tions No. 1 of 2007, strike out petition No. ABS/GOV/EPT/9/2007 for being incompetent.

It will be recalled that the trial tribunal based its finding in arriving at the conclusion that the 1st appellant was a member of Okija/Ogwugwu secret society on the evidence of the PW5 and exhibit HS.
H It is now apparent that the basis relied upon in arriving at that conclusion has been knocked off leaving the averment of the petitioners on the issue of 1st appellant being a member of the Okija/ Ogwugwu secret society bare. Since the petitioners/1st and 2nd respondents failed to establish the several stringent conditions set out in the defini-

tion S. 318 of the 1999 Constitution on what a secret society entails, no membership of any secret society not even Okija/ Ogwugwu could be ascribed to the 1st appellant. The 1st appellant was not a member of Okija/Ogwugwu secret society or any secret society before the election into the office of Governor of Abia State that took place on 14th April, 2007. Submissions were, however, made by the learned senior counsel for both parties on whether Okija shrine was a secret society or not and particularly referred to the Supreme Court case of Onyenge v. Ebere (2004) 13 NWLR (Pt. 889) 20. I have read the decision of the apex court and I found that the secret society status was in no way a live issue. What was instead before the court was the binding effect of oath taking vis-a-vis Okija shrine or Ukwu Custom or Ogwugwu Akpu secret society. In the case of Onyenge v. Ebere (supra) at pages 40, 41 and 42, Tobi. JSC held, inter alia:

"This court recognizes oath taking as a valid process under customary law arbitration. In Ume v. Okoronkwo (1996) 10 NWLR (Pt. 477) 133; (1996) 12 SCNJ 404, Ogwuegbu, JSC held that oath taking was one of the methods of establishing the truth of a matter and was known to customary law and accepted by both parties. I am bound by that decision I start with the well settled principle of law that where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out or resile from the decision so pronounced....."

It is my view that where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such a situation, the proof of ownership or title to land will be based on the rules set out by the traditional arbitration ruling in oath taking."

It is not in doubt that oath taking is one of the aspects that make for the definition of secret society as set out in S. 318 (1) of the 1999 Constitution. But there are several more constituents in the definition of secret society. Without those several constituents operating conjunctively the definition of secret society is not met. I cannot therefore hold that a soci-

ety, association, group or body of persons without more is a secret society. I instead hold, in the prevailing circumstances of this case, that Okija shrine which the PW1 (1st petitioner/1st respondent) alleged the 1st appellant is a member is popularly recognized as such in most pans of the South Eastern Zone of Nigeria not as a secret society but an arbitration shrine. The 1st appellant and by extension the 2nd appellant, in these circumstances, were not disqualified from the general election that took place on the 14th April, 2007 particularly in Abia State because the alleged stigmatization of the 1st appellant being a member of a secret society called Okija shrine was not established as being functional as such.

It is instructive to note that in view of the fact that the irregularity in the manner the sworn testimony of the PW5 and the inadmissible video clip (exhibit HS) were introduced, this court was robbed the opportunity of dealing with the issue of a secret society and which society or societies fall into that category. If Okija shrine which is claimed to have been in existence for a considerable length of time had devilish or unlawful intent bordering on secrecy, the authority or persons who find such a society unacceptable would have audibly protested about its continued existence for the relevant authority to react as was done by the defunct Government of Eastern Nigeria which enacted witchcraft and juju in council pursuant to Ss. 207(2) and 210(b) of the Criminal Code of Eastern Nigeria (See 1958 Laws of the Federation) whereat several shrines and societies existing in Eastern Nigeria were listed as unlawful shrines and societies. Equally, worthy of note is the Supreme Court case of Nwiboko Obodo v. The Queen (1958) 4 FSC 1; (1958) 1 SCNLR 464 where it pronounced the society known as “Odozi-Obodo Society” unlawful as it was oppressive to the people. Since Okija shrine has so far not been described as unlawful, it still remains Okija shrine simpliciter.

Issue Nos. 4 and 5 were distilled from grounds 10, 11, 12, 13, 14, 15 and 17 of the grounds of appeal. I find merit in each of the said grounds of appeal and allow them seriatim. I accordingly resolve issues No. 4 and 5 raised from those grounds in favour of the 1st and 2nd appellants.

As regards issue No. 6 which essentially relates to the non-resignation of the appellants from the public service of Abia State

and the purported membership of the 1st appellant of Okija secret society which are pre-election matters, did the lower tribunal have jurisdiction to entertain the said two pre-election matters and nullify the appellants' election?

I have read the copious submissions of the senior learned counsel for the 1st and 2nd appellants and the 1st and 2nd respondents on these issues, I agree that section 285(2) of the 1999 Constitution is relevant to their consideration. Section 285(2) above reads:

"285(2) There shall be established in each State of the Federation one or more election tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any Legislative House." (Italics mine for emphasis)

The purport of the foregoing provisions of S. 285(2) above, is clear that the jurisdiction of the trial tribunal is not at large but specific and limited to the hearing and determination of petitions relating to whether any person has been validly elected to the position of a Governor. It is not an inquisitorial tribunal and neither does it have power to investigate what transpired before the election. Indeed, the two issues of non-resignation from the positions of Chief of Staff and Commissioner held by the 1st and 2nd appellants and the purported membership of the 1st appellant of a secret society are, in my view, pre-election matters. Section 32(4) and (5) of the Electoral Act, 2006 specifically takes care of pre-election matters/Section 32(4) and (5) of the Electoral Act reads:

"32(4) Any person who has reasonable grounds to believe that any information given by a candidate in the affidavit is false may file a suit at the High Court of a State or Federal High Court against such person seeking a declaration that the information contained in the affidavit is false.

(5) If the court determines that any of the information contained in the affidavit is false, the court shall issue an order disqualifying the candidates from contesting the election."

The foregoing provisions which are jurisdictional in nature specifically vest in a State or Federal High Court to dis-

qualify any candidate who is otherwise disqualified by virtue of the reasons given in the petition without recourse to the election tribunal which is specifically set up and vested with original jurisdiction to hear and determine petitions as to whether any petitioner has been validly elected to the office of Governor

B nor or Deputy Governor or as a member of any Legislative House. It is very well settled that an Election Petition Tribunal is not an all purposes tribunal or court that can entertain all sorts of claims or reliefs. It is created for election matters alone. See *Obi v. IN EC* (2007) 11 NWLR (Pt. 1046) 565 at 635.

C It is also pertinent to refer to S. 182(g) and (h) of the 1999 Constitution (already reproduced) on circumstances of disqualification like non-resignation of a candidate who had been employed in public service of either the Federation or a State and membership of a secret society are pre-election matters which must be dealt with in either the Federal or State High Court before the election. See section 145 of the Electoral Act, 2006 which sets out the grounds on which any election can be questioned. Those grounds do not include pre-election matters. The law is settled that the grounds recognized for the purpose of presenting an election petition are acts or omissions that are contemporaneous with the conduct of the election. Election tribunal has no power to investigate matters which took place before the conduct of an election. See *Ibrahim v. INEC* (1999) 8 NWLR (Pt. 614) 334 at 351; *National Electoral Commission v. National Republican Convention* (1993) 1 NWLR (Pt. 267) 120.

F From the state of the records, it is clear that the issues of non-resignation from the public service of Abia State and membership of Okija shrine or secret society are pre-election matters which are ultra vires election tribunals because they were acts which were not contemporaneous with the conduct of the election which took place on 14th April, 2007. The two issues in effect are outside the provisions of S. 145 of the Electoral Act. They are incompetent and they are struck out. The decision of the trial tribunal accepting them as proof for non-resignation of the 1st and 2nd appellants from the public service of Abia State and that the 1st appellant was a member of Okija secret society is erroneous because it was not set up to deal with those issues as they did not deal with whether any person has been validly elected to the office of Governor. I accordingly find merit in

grounds 16 and 23 of the grounds of appeal and they are allowed. Issue No. 6 is therefore resolved in favour of the 1st and 2nd appellants.

Issue No. 7, which has already been reproduced (above) deal with a number of sub-issues like consolidation of petitions Nos. ABS/GOV/EPT/4/2007 and ABS/GOV/EPT/9/2007 and using a single line of witnesses to determine them (the petitions); allowing and adopting a witness (PW5) whose witness statement was attached only to the reply in petition No. ABS/GOV/EPT/9/2007 as a witness in petition No. ABS/GOV/EPT/4/2007; failure to give judgment for and in each of the consolidated petitions and not considering each of the two petitions before adopting judgment in one for the other.

I have carefully considered the submissions of the teamed senior counsel for the 1st and 2nd appellants and the 1st and 2nd respondents. I will reiterate that the court has already deprecated the approach of the trial tribunal which made use of the sworn testimony of the PW5 and the document marked HS.

This is a case in which consolidation of two petitions as stated above was sought and granted. The purpose and principle governing consolidation of actions and/or petitions have been lucidly set out in the case of Haruna v. Modibbo (2004) 16 NWLR (Pt. 900) 489 at 559 to 560 thus:

“The main purpose of consolidation is to save costs and time. It is to save multiplicity of action with attendant costs where one action would serve to determine the rights of a number of persons, where the persons have the same interests in one cause or matter. Any order of consolidation may be made either by consent of the parties or as a matter of expediency. It will not usually be ordered unless there is a common question of fact and law being of sufficient importance, in proportion to the rest of the subject matter”

It is also trite that consolidation is only for convenience of trial and does not fuse the consolidated cases. The causes still maintain their individual identity and character and the evidence given in respect of one does not ipso facto become evidence in the other or others. It is consolidation of actions as it will be absurd to have consolidation of judgments. It is also pertinent to state that in consolidated proceedings, there is no single cause of action to which all the persons concerned

are parties. Each of the separate suits consolidated has its own parties. The decision in each case is governed by the available relevant evidence adduced in support of actions consolidated. It will not make for strict adherence to the principles of consolidation if, in the course of writing a judgment, the reliefs sought by the two parties or more scamper for the part of the judgment favourable to him particularly in a very voluminous judgment as in the instant case. See Dugbo v. Kporoaro (1958) NMLR 7, reported as Kporoaro v. Dugbo (1958) SCNLR 180; Afoezioha v. Nwokoro (1999) 8 NWLR (Pt. 615) 393.) The legal authorities on consolidation of actions which are legion also regard the principle that judgments therein shall be separately read on the same day. See Buhari v. INEC and Abubakar v. Yar'Adua (2008) 4 NWLR Pt. 1078) 546; Senator (Prof.) O. Osunbor & Anor v. Comrade A. A. Oshiomhole & Ors. (Unreported) delivered on 11th November, 2008, reported as INEC v. Oshiomhole (2009) 4 NWLR (Pt. 1132) 607.

It is equally of moment to note that in consolidating actions, each action must be competent.

I have set out the foregoing principles on consolidation of actions to guide me in the consideration of issue No. 6. As regards the consolidation of petitions Nos. ABS/GOV/EPT/4/07 and ABS/GOV/EPT/9/07 and adopting a single line of witnesses wherein the trial tribunal allowed the PW5 whose sworn testimony was not frontloaded in the former petition but only brought in through the petitioner's reply to the respondent's reply in the latter petition to be used in arriving at its judgment. I have already held that approach which the trial tribunal approved and made use of is an affront to the novel doctrine of frontloading introduced into our jurisprudence by paragraph 1 (1)(a)(b) and (c) of the Practice Directions of 2007. That recourse dealt a fatal blow on the propriety of petition No. ABS/GOV/EPT/9/07 and it was struck out. The result is that one of the two petitions consolidated is incompetent thereby rendering the consolidation itself incompetent.

The principle of using a single line of witnesses in consolidated cases is that the same set of witnesses shall testify in the cases consolidated. The effect in the instant appeal is that all the witnesses in petition No. ABS/GOV/EPT/4/07 with only the sworn testimonies

frontloaded for the petition No. ABS/GOV/EPT/9/07 will be considered. This approach is totally not in keeping with the principles of consolidation of actions that each constituent of consolidated actions must be considered on its own evidence and judgment given thereon separately. I hold that the trial tribunal was in serious error by not complying with the principles of consolidation of action and it thereby occasioned miscarriage of justice. I find merit in ground 21 of the grounds of appeal. I accordingly resolve No. 7 in favour of the 1st and 2nd appellants. B

Issue No. 8 concerns the flawless finding of the trial tribunal that the appellants scored majority of lawful votes cast at the election based on the mandatory provisions of S. 179(2)(a) and (b) of the 1999 Constitution. I cannot but agree with that decision which the trial tribunal arrived after a skilful consideration of available facts. **I am, however, astound by the stance of the trial tribunal which turned a blind eye to its earlier decision that the appellants scored majority of yes votes cast at the election as well as having not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the Local Government Areas in Abia State and went on to return the 1st respondent as the winner of the election to the office of Governor of Abia State on 14th April, 2007. This chameleonic attitude of the trial tribunal which could have been its own way of awarding consequential relief is to say the least does not project a practical knowledge of what a consequential relief entails. The subsequent reversal of the finding of the trial tribunal returning the 1st respondent as the Governor of Abia State, a position he did not ask for is not only baselessly gratuitous, highly erroneous but also perverse. I shall interfere with the eventual findings of the trial tribunal and hold that the 1st and 2nd appellants are returned as the Governor and also Deputy Governor of Abia State. I find merit in grounds 18 and 20 of the grounds of appeal. Consequently, I resolve issue No. 8 in favour of the 1st and 2nd appellants.** C D E F G H

Issue No. 9, deals with the invocations of S. 146(1) of the Electoral Act, 2006 to the prevailing circumstances of this appeal. The section reads:

“146 (1) An election shall not be liable to be invalidated by

reason of non-compliance with the provisions of this Act if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that non-compliance did not affect substantially the result of the election. ”

B The purport of the foregoing provision is it also allows this court to assess the available evidence and opine on whether or not there has been substantial compliance with the provision of the Electoral Act, 2006.

C I have incisively considered the state of the record and the show of industry put into this appeal by the learned senior counsel for the parties in the respective briefs of argument of their clients. I hold contrary to the decision of the trial tribunal that there was substantial compliance with the way the 4th respondent (INEC) dealt with the issue of non-resignation from public office by the 1st and D 2nd appellants and the purported membership of Okija secret society because it performed its duty and ensured that those two issues were thoroughly investigated and relied upon. I equally find merit in ground 22 of the grounds of appeal. Consequently, I resolve issue No.9 in favour of the 1st and 2nd appellants.

E Issue No. 10 relates to whether or not the judgment of the trial tribunal is correct in view of the entire pleadings, the inadmissible evidence led before it (the trial tribunal) and the circumstances of this case. This issue is based on ground 24 of the grounds of appeal.

F The learned senior counsel for the 1st and 2nd respondents adopted all the arguments he canvassed based on the evidence adduced before the trial tribunal particularly based on the inadmissible nature of the evidence of the PW5 as well as exhibit HS. He cited in aid of the previous arguments the Supreme Court case of Mogaji v. G Odojin (1978) 4 SC 91 where it (the Supreme Court) enjoined all trial courts to put evidence adduced by parties before them on an imaginary scale so as to see which evidence weighs more than the other and decide the case on what is generally regarded as the preponderance of evidence.

H The learned senior counsel highlighted areas of errors by the trial tribunal. This, in rebuttal of the allegation of non-resignation of the appellants from public office, he referred to exhibits LC1, LC2 and LC3 (being exhibits on resignation by the appellants) to that effect but that the trial tribunal curiously discountenanced them on

the flimsy ground that they were not frontloaded or attached to the appellants' reply even though no objection was raised to the admissibility of those three exhibits by the petitioners/respondents' learned counsel. But curiously enough, the same tribunal made use of the sworn witness deposition of the PW5 which was not frontloaded as enjoined by paragraph 1(12)(a)(b) and (c) of the Practice Directions No. 1 of 2007 and which was brought in illegally through a reply to a reply. He further pointed out that aside the evidence of the obvious inadmissible evidence of the PW5, the trial tribunal countenanced exhibit HS, the video clip, which the maker was not called to testify on as to when he filmed or covered the incongruous event therein. He also exemplified the facts of errors that even though the trial tribunal itself in the course of its judgment found that the petitioners/1st and 2nd respondents did not score majority of lawful votes cast at the election, it thereafter made an order apparently against the weight of evidence returning the 1st and 2nd petitioners/1st and 2nd respondents as the Governor and Deputy Governor respectively. Equally pertinent to these areas of errors, the learned senior counsel having referred to the evidence of the PW1 that amounted to hearsay evidence which by its nature is inadmissible, went on to submit that yet the trial tribunal somersaulted and found for the 1st and 2nd petitioners/1st and 2nd respondents on the issue of non-resignation. He further submitted that this chameleonic stance of the trial tribunal amounted to its discrediting same evidence in one breath and accepting in another breath. He relied on the case of *Olawuyi v. Adeyemi* (1990) 4 NWLR (Pt. 147) 746 at 777 where it was held:

"However, when a trial Judge has discredited the evidence of a witness, he should not rely on such evidence or make a turn about to employ such evidence to strengthen the plaintiff's case. This is bound to lead to bizarre consequence which will throw the administration of justice into a quagmire. The scale or standard of justice for either party must remain and must be seen to remain constant for the parties alike."

Learned senior counsel for the appellants referred to a Supreme Court case of *Ayanwale v. Atanda* (1988) 1 NWLR (Pt. 68) 22 where at page 35, Obaseki, JSC, opined thus:

"Adjudication on any matter before a court of law is not an easy matter. Cogency of evidence led depends on a series of factors,

the most important of which is the credibility of witnesses in oral testimony.”

The learned senior counsel buttressed his arguments by calling in aid the case of Udo v. Okupa (1991) 5 NWLR (Pt. 191) 365 where Niki Tobi, JCA (as he then was) said at page 382:

B *“In the evaluation exercise, the trial Judge should always remind himself of his adversary and accusatorial role and deal with the evidence of the witnesses evenly and equally across the board to the egalitarian advantage or disadvantage of the parties. On no account should he “sponsor” the evidence of one of the parties at the expense of or to the detriment of the other party, unless such preference is borne out of or supported by the weight of evidence before him.”*

D He submitted that applying the foregoing principles and decided cases on what transpired at the trial tribunal, with great respect, it unjustifiably and unexpectedly sponsored the evidence of the 1st and 2nd respondents at the expense of the 1st and 2nd respondents/ 1st and 2nd appellants and the electorate at large. He argued that for no discernible of logical reason, the trial tribunal nullified the election
E of the 1st and 2nd appellants on very terse, unreliable, most suspicious, very incongruous and highly unmeritorious evidence of the PW1 in relation to non-resignation and the evidence of the PW5 in relation to the Okija secret society. He submitted that the entire judgment is perverse as the trial tribunal took into consideration matters
F which ought not to have taken cognizance of and shut its eyes to the very obvious and relied on the cases of Agina v. Agina (1991) 4 NWLR (Pt. 185) 358 at 371; and Atolagbe v. Shorum (1985) 1 NWLR (Pt. 2) 360 at 373.

G The learned senior counsel for the appellants particularly highlighted the issue of the membership of the 1st appellant in Okija secret society and submitted that there is no anomaly or illegality in the performance of any initiation which the PW5 branded in his testimony which is, albeit, inadmissible. He argued that S. 318 of the
H Constitution of 1999 does not forbid the performance of any initiation by any society, religious group, profession or institution. He expatiated that generally, all professions initiate all their new members into their folds.

On the issue of exhibit ‘HS’ that is to say the video clip, even

though at the risk of repetition the learned senior counsel for the appellants, observed that one Dr. G.C. Duru who the PW5 claimed to be its maker did not come to give evidence about the tape recording, it is only the said Dr. Duru who could give evidence on what he recorded and for what purpose. Furthermore, it is only Dr. Duru who can identify the persons he recorded and nobody else. Apart from his earlier submissions on the inadmissibility of exhibit HS, he referred to section 91(1)(a) and (b) of the Evidence Act which makes it further inadmissible. He called in aid the case of *Maduekwe v. Okoroafor* (1992) 9 NWLR (Pt. 263) 69 at 41 where this court held:

"I am of the view that even if the tape is relevant because it was pleaded that is not sufficient, the requirements of S.91 of the Evidence Act have to be met. Those provisions are important on the admissibility of documents (a class into which exhibit HS, the video tape falls) and they cannot be completely ignored whether the document is relevant or not relevant. I therefore hold that the tribunal (in this case, the Court of Appeal) was right to have rejected it."

It is also instructive to note the trite position in law that a defendant who did not lead evidence during trial may still be entitled to the judgment of the court where the plaintiff failed to call evidence on the material facts of the case or where the plaintiff is so patently or palpably described unreasonable that no reasonable tribunal can accept and act on it. A defendant can also obtain judgment in his favour without tendering oral evidence, if through cross-examination of the plaintiff and his witness and tendering of documents through them, he destroys and discredits the plaintiff's case and establishes an iron cast defence. (See the cases of *Hawad International Schools Ltd. v. Mima Projects Ventures Ltd.* (No. 2) (2005) 1 NWLR (Pt. 908) 552; *Aduke v. Aiyelabola* (1942) 8 "WACA 453; *Ofomaja v. Hon. Commissioner for Education* (1995) 8 NWLR (Pt. 411) 69. ***He urged the court to resolve issue No. 10 in favour of the 1st and 2nd appellants.***

I have extra diligently studied the brief of argument prepared by the learned senior counsel in behalf of the 1st and 2nd respondents. I could not find anywhere that any response was proffered to douse and/or counter the arguments and submission made by the learned senior counsel for the appellants. It is therefore safe to conclude that the learned senior counsel has apparently no submissions

to make on that issue (i.e. issue No. 10) raised from ground 24 of the grounds of appeal.

I must say this much that the learned senior counsel for the appellants has exhibited considerable industry in the treatment of issue No. 10. Any attempt by me to dissect the attendant submissions might be a wasteful venture (exercise). In effect, I dare say that those submissions are so impeccable that I agree with him. I find merit in ground No. 24 of the grounds of appeal and allow it. Issue No. 10 adumbrated from the said ground is accordingly resolved in favour of the 1st and 2nd appellants.

In the final analysis, I resolve all the ten issues raised from the twenty grounds of the grounds of appeal in favour of the 1st and 2nd appellant.

The appeal is meritorious and it is allowed. The judgment of the trial tribunal is set aside with a consequential order that the 1st and 2nd appellants are returned in keeping with the announcement made in behalf of the 4th respondent (INEC) on 15th April, 2007 as the Governor and Deputy Governor of Abia State respectively.

Costs of N50,000.00 are awarded against the 1st and 2nd respondents in favour of the 1st and 2nd appellants.

OGUNBIYI JCA

F I agree.

GALINJE JCA

I agree.

ARIWOOLA JCA

G I agree.

SHOREMI JCA

H I agree.